73-2003

NO.

Supreme Court, U. S.
FILED
JUL 9 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

SPIEGEL, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JACOB A. STEIN
1200 Eighteenth Street, N.W.
Washington, D. C. 20036

PATRICK W. O'BRIEN
DOUGLAS A. POE
231 South LaSalle Street
Chicago, Illinois 60604
Attorneys for Petitioner

Of Counsel:
STEIN, MITCHELL & MEZINES
MAYER, BROWN & PLATT

SORG/CHICAGO U.S.A.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
I. The Decision of the Court of Appeals Presents Important Questions of Federal Law Concerning Whether the Jurisdiction of the Federal Trade Commission to Issue Cease and Desist Orders in the Public Interest Justifies the Issuance of an Order Requiring that Eligibility Standards or Criteria for Qualification for the Extension of Credit Be Detailed in the Advertising of Free Trial and Discount Offers of Merchandise	10
II. The Court of Appeals Erred in Departing From the Standards Set Forth By This Court for Review of Federal Trade Commission Orders in Sustaining an Order Which Is (a) Vague and Excessively Broad in Scope and (b) Bears No Reasonable Relationship to the Issues Actually Adjudicated Before the Commission	20
Conclusion	27

Appendix:

PAGE

Federal Trade Commission Complaint ..... App. 1

Initial Decision of Hearing Examiner ..... App. 8

Final Order of Federal Trade Commission ..... App. 20

Excerpts From Proceedings Before Hearing Examiner ..... App. 23

Colloquy ..... App. 23

Testimony of Albert R. Bell ..... App. 29

Testimony of Nathan Braverman ..... App. 31

Testimony of Maurice Lagnado ..... App. 39

Spiegel's Exhibits ..... App. 41

Opinion of Court of Appeals for the Seventh Circuit ..... App. 45

Order of Court of Appeals Denying Petition for Rehearing ..... App. 60

TABLE OF CITATIONS

Cases

PAGE

American Home Products Corp. v. FTC, 402 F.2d 232 (6th Cir. 1968) 21

Arnold Stone Co. v. Federal Trade Commission, 49 F. 2d 1017 (5th Cir. 1931) 11

Asheville Board of Trade v. FTC, 294 F. 2d 619 (4th Cir. 1961) 21

Cotherman v. FTC, 417 F. 2d 587 (5th Cir. 1969) 21

Diener's, Inc. v. FTC, 494 F.2d 1132 (D.C. Cir. 1974) .. 20

Exposition Press v. FTC, 295 F. 2d 869 (2nd Cir. 1961) 11

Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948) 20

Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 20, 27

Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360 (1962) 20

Federal Trade Commission v. Klesner, 280 U.S. 19 (1929) 10, 12

Federal Trade Commission v. Milling Co., 288 U.S. 212 (1933) 11, 20

Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1931) 11, 12

Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952) 20

Flynn & Emrich Co. v. FTC, 52 F. 2d 836 (4th Cir. 1931) 11

Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) 20

PAGE

Marcus v. FTC, 354 F. 2d 85 (2nd Cir. 1965) 11

Moretrench Corp. v. FTC, 127 F. 2d 792 (2nd Cir. 1942) 12

Morgan v. United States, 304 U.S. 1 (1938) 15

Northam Warren Corp. v. FTC, 59 F. 2d 196 (2nd Cir. 1932) 11

S. Buchsbaum & Co. v. FTC, 160 F. 2d 121 (7th Cir. 1947) 11, 13

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 25

Statutes

15 U.S.C. § 45(a)(1) 3

15 U.S.C. § 45(b) 3, 10

15 U.S.C. § 45(d) 21

28 U.S.C. § 1254(1) 2

Other Authorities

G. Henderson, *The Federal Trade Commission* (1924) 12, 13

Commission On the Organization of the Executive Branch of the Government, 81st Cong., 2nd Sess., *Task Force Report on Regulatory Commissions*, app.N (Comm. Print. 1949) 13

The President's Advisory Council on Executive Organization, *A New Regulatory Framework* (January 1971) 13

R. Posner, *Regulation of Advertising by the FTC* (American Enterprises Institute, Evaluative Studies, 1973) 14

Report of ABA Commission to Study the Federal Trade Commission (September 15, 1969) 15

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO.

SPIEGEL, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Spiegel, Inc. ("Spiegel"), seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit which granted enforcement of an order of the Federal Trade Commission ("FTC") that directed Spiegel, *inter alia*, to cease and desist from certain allegedly deceptive advertising practices relating to the offer of merchandise on a "free trial" or other basis "unless [Spiegel] clearly and conspicuously discloses in immediate conjunction therewith any credit restriction or condition which would make a customer ineligible to qualify

under such offer or any other restriction or condition applicable to such offer." (App. 21).*

OPINIONS BELOW

The opinion of the Court of Appeals and the dissenting opinion of Circuit Judge Pell, reported at 494 F.2d 59 are reproduced in the Appendix (App. 45). The order of the FTC and the dissenting opinion of former FTC Chairman Miles W. Kirkpatrick are reproduced in the Appendix (App. 20).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 18, 1974. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 16, 1974 (App. 60). This Petition was filed within 90 days of the Court of Appeals' denial of the Petition for Rehearing; and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the basic jurisdictional requirement of the Federal Trade Commission Act—that the purpose of a Complaint filed under the Act must be protection of the public interest—justifies the issuance of an order requiring that eligibility standards or criteria for qualification for the extension of credit be detailed in the advertising of free trial and discount offers of merchandise.

---

* The "App." references are to the Appendix filed with this Petition. The "R." references are to the original Record of Proceedings before the FTC Hearing Examiner held in Washington, D.C. on December 29, 1971 and in Chicago, Illinois on April 18, 1972.

2. Whether the Court of Appeals erred in departing from the standards set forth by this Court in sustaining an order of the FTC which is (a) vague and excessively broad in scope and (b) bears no reasonable relationship to the issues actually adjudicated before the FTC.

STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 45 U.S.C. § 45(a)(1):

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. § 45(b):

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . ."

STATEMENT OF THE CASE.

For a number of years, Spiegel has, from time to time, offered to its customers, through direct mailings and advertising in the news media, various types of "free trial" offers and "discount" offers. "Free trial" offers permit the customer to utilize merchandise for a given period of time in order to determine whether he wants to keep the merchandise. If the consumer decides not to keep the merchandise, he may return it to Spiegel without charge. "Discount" offers (sometimes referred to as "percentage off" or "percentage off the usual amount" offers) permit a consumer to purchase merchandise at a given percentage price reduction below the price regularly charged for the merchandise in question.* Both classes of offers stated that they were subject to Spiegel's credit approval or subject to Spiegel's acceptance, so that if a customer decided to keep the merchandise and to pay for it by means of an extension of credit by Spiegel, the customer would have to satisfy Spiegel's established standards for the extension of credit. The basic issues presented in the instant case are whether the FTC has authority to order Spiegel to detail the circumstances under which credit will be extended in advertising the two classes of offers in question and, secondly, whether the FTC order, sustained by a divided Court of Appeals, requiring that the circumstances under which credit will be extended be detailed in Spiegel's advertising, is vague and ambiguous and is not reasonably related to the issues litigated before the FTC.

On November 8, 1971, the FTC issued its complaint against Spiegel, alleging, *inter alia*, that Spiegel, in mak-

---

* Spiegel discontinued the "discount" offers in 1970, and they have not been resumed. (See page 5, *infra*.)

ing "free trial" or "discount" offers, failed to state with specificity that such offers were subject to credit approval by Spiegel and failed to detail the circumstances under which such credit approval would be granted or withheld. *

After counsel for Spiegel and the FTC stipulated that "credit approval by [Spiegel] is the only restriction or condition qualifying its advertised free trial offers or percent off offers" (Stipulation, dated March 27, 1972), a one-day hearing was held on April 18, 1972. At that hearing Spiegel's Vice President in Charge of Marketing, Nathan Braverman, and Maurice Lagnado, Spiegel's Assistant Treasurer, testified that:

(a) "Percentage off" offers were terminated in 1970 and will not be resumed.**

---

* The FTC complaint is hardly free from ambiguity. The complaint charged simultaneously that Spiegel used deceptive advertising by offering to deliver merchandise on a "free trial" basis *in an effort to make sales*, while other allegations of the complaint alleged that Spiegel used identical deception to *refuse* to make delivery of merchandise to certain applicants who sought to take advantage of Spiegel's "free trial" offers (App. 4-5). Moreover, although the complaint alleged that the free trial use of merchandise was withheld because the consumer was not informed that credit approval was a contingency of the offers, the illustrative advertisement set forth in paragraph Four-C of the complaint (App. 3) stated that "[n]aturally to be accepted for a Spiegel Budget Power account, you must be steadily employed, reside at a permanent address, and have a good record." The Hearing Examiner, at the initial pre-hearing conference on December 29, 1971, raised the question of the need for an order to protect the public interest where the complaint itself contained evidence that the consumer was informed of the conditions with respect to the offers (R. 24-29; App. 23-27) and also noted that the complaint was ambiguous in that it alleged that sales *are being made* through deception and simultaneously that Spiegel *refuses* to make sales to persons failing to meet certain undisclosed credit standards (R. 24, 29; App. 23, 26).

** R. 48-49, 73; App. 32-33, 34.

(b) The determination of credit acceptability is a complex subject involving the weighing of many complex factors. To increase the complexity, the factors are continuously changing and the importance of any given factor changes from time to time.*

(c) To Mr. Braverman's knowledge no "percentage off" or "free trial" offers were mailed from 1967 to the present time without a statement of conditions applicable to the offer.**

(d) In regard to the Commission's Exhibit A (CX-1Z5), the order blank is missing and the Exhibit is therefore incomplete. ***

(e) The application form for "free trial" and "percentage off" merchandise always contained the condition that the order was subject to acceptance by Spiegel. ****

(f) In all categories of its advertising, there is attached to the order blank a postage-free envelope. *****

The documentary evidence produced by complaint counsel consisted of the stipulation and a series of Spiegel's advertisements, each one of which contained in one form or another an express credit approval condition with respect to the offer. The only exhibit without such notification was identified by Mr. Braverman as incomplete be-

---

* R. 59, 77-78, 81, 95-98, 109, 112; App. 33-34, 37-40.

** R. 73-75; App. 34-35.

*** R. 55; App. 33.

**** R. 73-74; App. 34-35.

***** R. 84; App. 39.

cause the stamped application blank, which recited the customary qualifying language, was missing. *

Following the hearing, both Spiegel and complaint counsel appealed from the Initial Decision of the Hearing Examiner. The FTC, after oral argument, entered its order on January 9, 1973, with Chairman Kirkpatrick dissenting. The Commission adopted the following order after granting complaint counsel's appeal and denying Spiegel's appeal:

> "It is Ordered that respondent Spiegel, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires, or other article of merchandise, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> (1) Representing, directly or by implication, to prospective credit customers that merchandise is being offered on a free trial basis, or at a percentage or amount off the usual and regular price, unless respondent clearly and conspicuously discloses in immediate conjunction with such offer that it is subject to respondent's credit approval.
>
> (2) Representing, directly or by implication, to respondent's established credit customers that merchandise is being offered on a free trial basis unless respondent clearly and conspicuously discloses in immediate conjunction therewith any credit restriction or condition which would make a customer ineligible to qualify under such offer

* R. 55; App. 33.

or any other restriction or condition applicable to such offer.

(3) Failing to clearly and conspicuously disclose at the top of questionnaires requesting information from prospective credit customers ordering merchandise pursuant to a free trial offer or other offer that it is an application for credit and that merchandise will be sent to the prospective customer only if such customer is approved for credit by respondent.

(4) Representing, directly or by implication, that an offer of a free trial of merchandise, a reduction in the price of merchandise, or any other kind of offer is made or is available without conditions or restrictions when such offer is subject to conditions or restrictions not revealed therein."

The then Chairman of the Federal Trade Commission, Miles W. Kirkpatrick, refused to join his fellow Commissioners in affirming the Initial Decision of the Hearing Examiner. Chairman Kirkpatrick dissented as follows:

"I cannot agree that consumers would fail to appreciate that Spiegel's free-trial offers necessarily were subject to acceptance by Spiegel. The nature and amount of information obtained by Spiegel on its application forms, in my opinion, puts the consumer on notice that Spiegel has established criteria which prospective customers must meet prior to receiving the merchandise on a free-trial basis. It seems to me unlikely that a consumer would conclude that the information provided on the application form was irrelevant to Spiegel in deciding whether or not to provide the consumer with the offered merchandise.

"Of course, it is arguable that some few prospective customers who sent in filled-in application forms may not have fully understood the conditional nature of

the offer. Also, I appreciate that economic injury is not always a condition precedent to an order under Section 5. However, *in the circumstances of this case where no economic loss of any consequence appears and where no testimony was received with respect to consumers' understanding of the import of the application forms or whether Spiegel's disclosures were in fact sufficient, the entry of an order is not warranted.*" (Emphasis added.)

On petition for review, the Court of Appeals for the Seventh Circuit, in a two-to-one decision, concluded, *inter alia*, that "[t]here is no merit in Spiegel's contention that the [FTC] order should be set aside as too trivial for Commission attention" (App. 48) and that the FTC "order is reasonably related to the violations found" (App. 52). Circuit Judge Pell, dissenting, concluded that "[i]f for no other reason, the order of the FTC should be set aside by this court because of the utter triviality of the matter involved" (App. 54) and that "in any event, the order entered by the Commission is far too broad and is unjustified by this particular velitation." (App. 59).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals Presents Important Questions Concerning Whether the Jurisdiction of the Federal Trade Commission to Issue Cease and Desist Orders in the Public Interest Justifies the Issuance of an Order Requiring That Eligibility Standards or Criteria for Qualification for the Extension of Credit Be Detailed in the Advertising of Free Trial and Discount Offers of Merchandise.

At least since the decision of this Court in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), it has been well-established that "to justify the Commission in filing a complaint under § 5 [of the Federal Trade Commission Act], the purpose must be protection of the public." *Id.* at 27. This basic jurisdictional requirement is contained in Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. § 45(b), which permits the FTC to issue a complaint "if it shall appear to the Commission that a proceeding by it . . . would be *to the interest of the public*. . . ." (Emphasis added.) As explained by Mr. Justice Brandeis, writing for the Court in *Klesner*:

> "[t]o justify filing a complaint *the public interest must be specific and substantial.* Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and

> widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." *Id.* at 28. (Emphasis added and citations omitted.)

Accord, *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 649 (1931), where this Court noted that

> "the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, *the Commission still may not proceed unless it further appears that a proceeding would be to the interest of the public, and that such interest is specific and substantial.*" (Emphasis added.)

See *Federal Trade Commission* v. *Milling Co.*, 288 U.S. 212, 217 (1933).

The various courts of appeals, which have primary responsibility to review FTC orders, have generally followed the standards set forth by this Court,* although not infrequently, as in the present case, a court of appeals has been sharply divided as to whether a particular FTC proceeding met the statutory "public interest" criterion. Thus, for example, in *Exposition Press* v. *FTC*, 295 F.2d 869, 876-877 (2nd Cir. 1961), Judge Friendly, dissenting from a decision of a panel majority which had affirmed an FTC order, stated:

---

* See, *e.g.*, *Marcus* v. *FTC*, 354 F.2d 85, 87 (2nd Cir. 1965); *S. Buchsbaum & Co.* v. *FTC*, 160 F.2d 121, 123 (7th Cir. 1947); *Northam Warren Corp.* v. *FTC*, 59 F.2d 196, 198 (2nd Cir. 1932); *Flynn & Emrich Co.* v. *FTC*, 52 F.2d 836, 838-839 (4th Cir. 1931); *Arnold Stone Co.* v. *FTC*, 49 F.2d 1017, 1019 (5th Cir. 1931).

"In F.T.C. v. Klesner, 1929, 280 U.S. 19, 30, 50 S.Ct. 1, 4, 74 L.Ed. 138, the Supreme Court held that although the Commission's preliminary determination that institution of a proceeding is in the public interest 'will ordinarily be accepted by the courts,' *such action 'is subject to judicial review'; that if it appears at any time that the proceeding is not in the public interest, the Commission ought dismiss the complaint; and that if the Commission nevertheless enters an order, 'the court should without enquiry into the merits, dismiss the suit.'*

"It is deeply significant that the Klesner opinion was written by Mr. Justice Brandeis. For 'he, more than any other man, was the begetter' of the Federal Trade Commission. Two years before that opinion, Henderson had published his critical study of the Commission, suggesting, among other things, that 'it should exercise a greater discretion in selecting those cases which involve questions of public importance' and querying, as to the Klesner proceeding, 5 F.T.C. 24 (1922), 'what there was in the case to call for the intervention of a federal administrative tribunal.' It is hardly accidental that Mr. Justice Brandeis placed the Supreme Court's decision in Klesner on the ground that he did, rather than simply affirming the Court of Appeals, 1928, 25 F.2d 524, 58 App.D.C. 100, on the merits. His opinion was a summons to the Commission to do what it had been created to do, to get on with 'the great purpose of the act,' as Mr. Justice Sutherland, also not without direct knowledge of the Act's origins, was later to say in an opinion in which Brandeis joined, F.T.C. v. Raladam Co., 283 U.S. at page 650, 51 S.Ct. at page 591, 75 L.Ed. 1324. True, as my brothers point out, Klesner involved a private controversy as the instant case does not; *but the basis of the Klesner decision was not the presence of a private interest but the absence of a public one.* In Moretrench Corporation v. F.T.C., 2 Cir., 1942, 127 F.2d 792, 795,

> Judge Learned Hand, reviewing Klesner in the light of subsequent decisions, said that it '*is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission.*' See also S. Buchsbaum & Co. v. F.T.C., 7 Cir., 1947, 160 F.2d 121, 123. . . . [T]he government funds that have been spent on this proceeding, not to speak of the diversion of energies from more worthwhile tasks, outrun any possible public benefit by a tremendous margin." (Emphasis added and footnotes omitted.)

Various commentators and study groups have likewise observed that the Commission devotes an excessive amount of its resources to trivial matters. As early as 1924, only nine years after the Commission had begun to operate, it was stated that

> "the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern." G. Henderson, *The Federal Trade Commission* 337 (1924).

Similarly, the Hoover Commission noted in 1949 that

> "in the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance." Commission on the Organization of the Executive Branch of the Government, 81st Cong., 2d Sess., *Task Force Report on Regulatory Commissions*, app. N, 128 (Comm. Print 1949).

More recently, The President's Advisory Council on Executive Organization, in its report entitled *A New Regulatory Framework* (January, 1971), stated:

> "Much of the criticism of the FTC is aimed at its disproportionate attention to comparatively trivial matters—resulting largely from the breadth of its mandate and compounded by inherent deficiencies of the collegial form of organization. Preoccupation with minutiae over the years has created a 'jack of all trades—master of none' profile for the FTC." *Id.* at 87.

In a review of recent FTC decisions, Professor Richard A. Posner of the University of Chicago Law School stated the following with specific reference to the instant case as decided by the FTC:

> "The residual category of marginal cases in the 1972-1973 sample contains a number of interesting illustrations of the commission's concern with practices not in fact seriously deceptive. . . .
>
> "A fourth case involved a disclosure in a mail order house's catalogue that 'all orders are subject to [firm name]'s credit approval.' The commission held that this did not apprise the customer with sufficient clarity that monthly payments must be paid regularly by the customer and that other conditions must be met before credit would be extended. The element of deception is, at the very least, elusive. Everyone knows that conditions such as prompt payment are ordinarily attached to the extension of credit." Posner, *Regulation of Advertising by the FTC* 26-27 (American Enterprises Institute, Evaluative Studies, 1973).

It is difficult to conceive a proceeding with less public interest, within the meaning of the foregoing authorities, than the instant case. Chairman Kirkpatrick in his dissenting opinion (pages 8-9, *supra*) cogently pointed out the needlessness of an order where reasonable notice was in fact given of the requirement of credit approval to

those to whom Spiegel's advertising was directed and there was no evidence that anyone was injured. *

Moreover, even if evidence had been produced to demonstrate that no statement was made of the contingency of credit approval (and all the evidence was to the contrary), the Commission defaulted on the issues of any possible prejudice or injury to the public or to Spiegel's competitors. No evidence was presented that any consumer had been misled or reasonably could have been misled. No consumer was identified as having been rejected for failure to meet Spiegel's credit standards. No evidence was presented that any of Spiegel's competitors had been affected.**

It is important in this connection to emphasize, as Judge Pell noted in his dissenting opinion, that

> "[t]his is not a case where we are dealing with hidden charges which would vitiate the supposed discount,

---

* It is also significant that Chairman Kirkpatrick, before his appointment as Chairman of the Federal Trade Commission, was Chairman of the American Bar Association Committee which conducted a detailed study and appraisal of the Federal Trade Commission. *Report of ABA Commission to Study the Federal Trade Commission*, dated September 15, 1969. At page 2 of the comprehensive report of the Kirkpatrick Committee, the following comments are found:

> "Turning to specific areas of FTC efforts, we find, first, that in the field of consumer protection, the agency has been preoccupied with technical labeling and advertising practices of the most inconsequential sort."

** To the contrary, Spiegel attempted to demonstrate that its practices had no capacity to injure its competitors because Spiegel was merely following customary practices in advertising various offers of merchandise. The Hearing Examiner, however, prevented Spiegel from making any showing as to the practices of any of its competitors. This action, in and of itself, deprived Spiegel of a fair hearing before the FTC. Cf. *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938).

nor one where the applicant was supposedly getting a free trial but was actually required to keep the goods once they reached his possession. In fact, the parties stipulated that credit approval was the only restriction or condition qualifying these offers.

* * *

"Under any interpretation of the advertising material, it is clear that one cannot partake either of the free trial period or the discount without filling out and signing the order form. It is necessary for the prospective free trial user or discount applicant, if a new customer, to give detailed information about marital status, income, financial obligations, nature of employment, and similar factual data for credit evaluation. In varying language, the order form makes it clear that all orders are subject to acceptance by Spiegel. As to established credit customers, I cannot conceive that they were not already aware of the fact that a favorable credit rating is required and that if they are delinquent they will not be the beneficiary of further unpaid-for utilization of Spiegel merchandise." (App. 56-57.)

The majority opinion apparently, though the matter is not entirely free from doubt, did not disagree with the basic thrust of Judge Pell's analysis. Thus the majority opinion states that

> "[t]he Commission did *not* find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the 'free trial' and 'percent off' offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, *the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.*" (App. 51.) (Emphasis added.)

The majority opinion similarly is critical of Spiegel for not "positioning conditions where the average person in

Spiegel's market would be likely to overlook them." (App. 52.) If, as the majority opinion states, the allegedly deceptive practice "was in the placement and print size of the conditions, not the lack of statement of [credit] conditions," then it is indeed difficult to understand why the dissenting opinion is not correct in the view that "the order of the FTC should be set aside . . . because of the utter triviality of the matter involved." (App. 54.)

The significance of this case does not lie in the mere fact that Spiegel has been ordered by the FTC and the Court of Appeals to inform its free trial and discount customers that these particular offers are subject to Spiegel's credit approval. While Spiegel has insisted that it does adequately inform these customers of the condition of credit approval, nevertheless Spiegel requested, as alternative relief in the Court of Appeals, that the Court modify the FTC's order so as to leave standing that portion of the order which requires Spiegel to advise its customers that free trial offers are subject to credit approval. This step is, and would be, unobjectionable to Spiegel. The burdensome and unjustified aspect of the FTC order is the requirement that, beyond the factor of credit approval, Spiegel must state in its advertising the criteria which may make a customer ineligible for the extension of credit.

Moreover, the importance of the instant case lies in the fact that, as the dissenting opinion noted (App. 59), numerous other companies have engaged, and do currently engage, in the practice of making free trial offers. Thus the basic questions of whether the placement and print size of credit conditions which may accompany such offers are matters of such importance as to require FTC regulation in the "public interest," and, if so, the extent of the regu-

lation which is permissible or appropriate, are matters that gravely concern not only Spiegel but also numerous other companies. Unfortunately, the confusion for all companies which may be concerned is exacerbated by the fact that the majority opinion of the Court of Appeals has sanctioned a sweeping cease and desist order that, for reasons more fully elaborated in Section II of this Petition, do not appear to be consistent with the majority's opinion's basic analysis of the issues involved in the present case.

Moreover, the majority opinion, by ignoring the common practices which are used by sellers who provide retail credit to their customers, casts a serious shadow of doubt upon closely-related, commonly used and wholly legitimate retail credit practices. For example, one need only examine virtually any newspaper where numerous advertisements can be found relating to the sale of merchandise on credit which contain only a phrase such as "Just say charge it," "Charge it," or references acknowledging that the retail seller honors "all national credit cards." There is, in such advertisements, a complete absence of any admonition to the prospective customer similar to those which the FTC would impose upon Spiegel such as that (a) he must establish an account in order to "Charge it," (b) if an account is opened, that he must keep up his payments in order to add new purchases, (c) if a credit card is involved, that his credit standing with the issuer of the card must be unimpaired, or (d) that he does not exceed the credit limits set in his credit card or his credit account. Presumably, though in view of the Court of Appeals' decision the matter is no longer free from doubt, the universal absence of such warnings concerning credit conditions or limitations in advertisements does not constitute mass deception in retail credit advertising. Spiegel submits, as Judge Pell

stated in his dissenting opinion (App. 57), that credit users already know the obvious without reminders that credit must be established prior to its use and that its continued use is conditional upon maintenance of agreed payments and subject to credit limitations. The presumed expertise of the FTC, therefore, should not be permitted to override common sense and common knowledge of retail credit users. In short, fiction should not be allowed to triumph over intuitively obvious facts simply because the FTC chose to ignore the realities of everyday credit transactions.

Finally, the order adopted by the FTC, and enforced by the Court of Appeals, actually contravenes the public interest because its clear tendency will be to curtail sharply, if not to eliminate entirely, the use of free trial offers.* It is self-evident that a consumer's interest is served by a free trial use of merchandise. A product found to be unuseful for any reason can be returned to Spiegel or to any other honest vendor under the terms of a free trial offer. No questions are asked. The FTC, however, in its pursuit of trivial matters, will at a minimum curtail the use of free trial offers or discount offers as a retail selling method. The vice that afflicts the FTC is clearly apparent in the instant case. If the FTC were acting in the public interest, it would encourage free trial offers as one of the fairest methods of selling now in existence.

---

* The extent to which such curtailment will occur is presently a matter of some speculation because the ambiguities and inconsistencies inherent in the FTC order and the majority opinion of the Court of Appeals leave wholly unclear what is required of sellers that currently use the free trial method of selling. See pages 20-27, *infra*. What does seem clear is that the order, as interpreted by the FTC before the Court of Appeals (page 23, *infra*), will have a marked effect upon the continued use of free trial offers.

II.

The Court of Appeals Erred in Departing From the Standards Set Forth By This Court in Sustaining an Order of the FTC Which Is (a) Vague and Excessively Broad in Scope and (b) Bears No Reasonable Relationship to the Issues Actually Adjudicated Before the FTC.

This Court has repeatedly stressed that an FTC order must bear a "reasonable relation to the unlawful practices found to exist," *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952), and that FTC orders "should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." *FTC* v. *Milling Co.*, 288 U.S. 212, 217 (1933). See *e.g.*, *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946). As this Court stated in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965):

> "This Court has also warned that an order's prohibitions 'should be clear and precise in order that they may be understood by those against whom they are directed.' Federal Trade Comm'n v. Cement Institute, [333 U.S. 683, 726 (1948)] and that '[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.' Federal Trade Comm'n v. Henry Broch & Co., 368 U.S. 360, 367-368." *

---

* As the Court of Appeals for the District of Columbia noted recently in modifying an overly broad and ambiguous FTC order:

> "We do not feel that approval of the order in its present form is a prudential resolution of this issue. Examination of the entire order does suggest that perhaps petitioners may be unduly sensitive to the language of certain parts. Nonetheless, *portions of the order do speak in sweeping terms and may leave*

(Footnote continued)

If anything is clear in the context of the present, it is that both the FTC and the Court of Appeals majority opinion fell far short of following the guidelines and standards consistently applied by this Court. In order to place these deficiencies in their proper perspective, a brief review of the FTC and Court of Appeals proceedings is required.

In the first instance, as the majority opinion correctly noted,

> "The parties at the [FTC] hearing stipulated that the *sole issue* before the examiner was whether Spiegel's advertisements of *'free trial' offers or 'percent off' offers* are unfair or deceptive because of the manner in which customers are notified of Spiegel's requirement of *credit approval* in order to obtain the benefit of such offers." (App. 52 n.6.) (Emphasis added.)

Notwithstanding the carefully defined issues detailed in the stipulation, the Hearing Examiner ordered Spiegel to cease and desist from:

(Footnote continued)

> *petitioners justifiably uncertain as to what they can, and what they cannot, do. We think that an ordering provision should be as free of ambiguity as possible.* Thus we feel it appropriate to exercise our power of appellate modification, 15 U.S.C. § 45 (d), to recast the order in more specific terms corresponding with the interpretations of the present order that the Commission has offered to this court. While recognizing that our modification may in some respects compound the already existing redundancy of some of its provisions, a redundant cease and desist order is, surely, preferable to an ambiguous one." *Diener's, Inc.* v. *FTC*, 494 F.2d 1132, 1134 (D.C. Cir. 1974). (Emphasis added.)

See, *e.g.*, *American Home Products* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968) and cases cited therein; *Asheville Board of Trade* v. *FTC*, 294 F.2d 619, 628 (4th Cir. 1961). See also *Cotherman* v. *FTC*, 417 F.2d 587, 595-596 (5th Cir. 1969).

> "Representing, directly or by implication, that merchandise is being offered on a free trial basis or at a percentage or amount off the usual and regular price *unless substantially all credit restrictions or conditions applicable to such offers are clearly and conspicuously disclosed in reasonably immediate connection therewith.* (App. 19.) (Emphasis added.)

The FTC complaint counsel, apparently disturbed by the vagueness and overbreath of the Hearing Examiner's order, stated in his appeal brief to the full Commission:

> "Bearing on these questions is evidence in this case that Spiegel determines credit eligibility of prospective credit customers by the use of numerous factors as reflected in its 'Credit Analyzer' (CZ-2). These factors could possibly be construed to be the credit restrictions or conditions referred in both forms of orders. If so interpreted, these factors as a practical matter could not be set forth with the free trial offer because of limits on advertising space. *In effect, then, it would absolutely ban free trial offers by [Spiegel]. In these circumstances it would seem appropriate to rephrase the order so that credit approval is identified as the condition to be disclosed to avoid misunderstanding or confusion as to what the order requires in this regard.*" Complaint Counsel Brief, July 28, 1972, page 4. (Emphasis added.)

In response to complaint counsel's observations, the FTC did indeed modify the Hearing Examiner's order, adopting the four-part order previously set forth in full at pages 7-8, *supra*. However, in so doing, the FTC merely added further confusion and uncertainty with respect to the scope of the order. In the first instance, the FTC order, in paragraphs 1 and 3 thereof, purported to distinguish between Spiegel's new customers and its established customers, an issue which was not within the scope of the stipulation. More importantly, the FTC retained, particularly

in paragraph 4 of its order, the vague and ambiguous language of the Hearing Examiner's order. Indeed, in at least one respect the FTC order is even broader than that proposed by the Hearing Examiner because, while the Hearing Examiner limited his order to free trial offers and percentage or amount off the usual price offers, the Commission included in paragraph 4 of its order restrictions with respect to "any other kind of offer" and in paragraph 3 restrictions as to "a free trial offer or other offer."

In the Court of Appeals, faced with the necessity of defending an order vague and ambiguous on its face, the FTC attempted to give more specific content to the terms of the FTC order derived from the Hearing Examiner's Initial Decision. Thus the FTC stated in its brief to the Court of Appeals:

> "In summary terms, Spiegel has failed to disclose to potential new customers that its offers are conditioned on approval of each offeree as a credit risk, and to disclose to established customers that the offer is conditioned on their having their account up to date, having made monthly payments on time, having used their accounts within the previous twelve month period, and not ordering merchandise in excess of their particular credit limit when aggregated with their present outstanding balance." FTC Brief, page 27.

Of course, if the foregoing is in fact what the FTC order is intended to mean, it is entirely unclear why the FTC could not have so stated in specific and precise terms as it is required to do under the principles consistently enunciated by this Court. Moreover, whatever interpretation of the order may have been represented to the Court of Appeals, it was the FTC order as written which the Court of Appeals ordered to be enforced, not the interpretive gloss placed thereon in the FTC brief or the Initial Decision of the Hearing Examiner.

Briefly stated, the ambiguities and overbreadth of the FTC order may be summarized as follows:

Paragraph 4 of the FTC order directs Spiegel to cease

> "[r]epresenting, directly or by implication, that an offer of a free trial of merchandise, a reduction in the price of merchandise, *or any other kind of offer* is made or is available without conditions or restrictions when such offer is subject *to conditions or restrictions* not revealed therein." (Emphasis added.)

The *only* issues raised before the FTC related to Spiegel's free trial and percentage off offers; yet, paragraph 4, in referring to "any other kind of offer," is, on its face, completely open-ended and thus has no conceivable relationship to the narrow issues litigated before the FTC.* Likewise, the phrase "conditions or restrictions" is certainly overly broad, for the *only* issues raised before the FTC related to *credit* restrictions or conditions.** What other types of offers—apart from free trial and percentage off—and what other classes of "conditions or restrictions"—other than credit conditions—the FTC has in mind remains a total mystery because the issues were neither raised nor litigated before the Commission, a fact which even the majority opinion tacitly concedes. See page 21, *supra*. As previously noted, according to the FTC's Brief filed in the Court of Appeals, the credit restrictions or conditions are at least four in number. But it is hardly clear how the Commission can read these specific factors into the broad language of paragraphs 2 and 4.

---

* Paragraph 3 of the FTC order suffers from the same vice in its reference to "a free trial offer or other offer."

** Similarly, Paragraph 2 of the FTC order refers to "any other restriction or condition" without any limitation whatsoever to *credit* restrictions, the only matter litigated before the FTC.

In view of the convoluted history of this case, it is not surprising that the majority opinion of the Court of Appeals exhibits basic inconsistencies. Indeed, it is not entirely clear from the majority opinion precisely how Spiegel has allegedly engaged in deceptive practices. Thus the majority opinion states that "[t]he promise of an unconditional 'free trial' or 'percent off,' when both are conditional, is not in the public interest. A good society depends upon promises being kept." (App. 50.) The implication from this passage is that Spiegel did not disclose that its offers were subject to Spiegel's credit approval, an implication which is also purportedly supported by the example of Spiegel's advertising material quoted in the majority opinion. (App. 51.)* If non-disclosure is the thrust of the majority's analysis, it wholly ignores the uncontradicted testimony that *all* orders made pursuant to any offer were received *only* on order blanks, all of which stated that they were subject to Spiegel's acceptance. See pages 5-7, *supra*.

---

* It should be noted that the free trial offer circular, upon which the majority opinion heavily relies (App. 51), was discontinued in the fall of 1969, fully two years prior to the filing of the FTC complaint against Spiegel on November 8, 1971. Beginning in January, 1970, similar circulars contained the express notice that "all orders [are] subject to [Spiegel's] final acceptance," or similar notices. Thus the majority opinion, like the FTC in its brief to the Court of Appeals, has, in effect, chosen to condemn Spiegel's conduct by relying upon long-discontinued advertising material. It would appear, therefore, that the panel majority failed to take into account the record as a whole when it concluded that the FTC order should be enforced. This procedure is inconsistent with the standards for agency review established by this Court which requires that an agency's findings be set aside when the record before the Court of Appeals indicates that the agency's decision is not justified "by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within the special competence or both." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951).

The majority opinion, however, goes on to state that:

> "[t]he Commission did *not* find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the 'free trial' and 'percent off' offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, *the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.*" (App. 51.)

If, as the majority opinion indicates, the allegedly deceptive practice "was in the placement and print size of the conditions, not the lack of statement of [credit] conditions," then the holding of the majority opinion is difficult to square with the broad order entered by the FTC, which, however viewed, is *not* limited to "the placement and print size of the [credit] conditions." See pages 21-24, *supra*. Specifically, a statement of specific credit restrictions or conditions is inconsistent with the majority opinion's conclusion that "the alleged deceptive factor was in the placement and print size of the conditions, *not the lack of statement of conditions*" and that Spiegel had erred only "*by positioning conditions* where the average person in Spiegel's market would be likely to overlook them." (App. 51, 52.) (Emphasis added.)

In short, what apparently occurred is that the majority of the Court of Appeals ordered the enforcement of an FTC order which is not only ambiguous and overly broad on its face, but which is, additionally, inconsistent with the majority opinion's analysis that only the placement or positioning and print size of credit conditions in connection with free trial or percentage off offers were at issue.

The end result of the proceedings, both before the FTC and the Court of Appeals, is to leave not only Spiegel, but

also numerous other companies similarly situated, totally at a loss to understand what is to be required by way of disclosure of conditions which may affect offers to be made in the future. In short, the present case is a classic illustration of the failure of the FTC and the Court of Appeals to comply with the repeated admonitions of this Court that FTC orders must be fashioned "which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965), and cases cited therein.

Because the Court of Appeals has so far departed from the standards consistently set forth by this Court for the enforcement of FTC orders, and because the majority opinion of the Court of Appeals creates massive confusion as to what is required of retail vendors, including, but not limited to, Spiegel, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JACOB A. STEIN
PATRICK W. O'BRIEN
DOUGLAS A. POE
Attorneys for Petitioner

Of Counsel:
STEIN, MITCHELL & MEZINES
1200 Eighteenth Street, N.W.
Washington, D. C. 20036
(202) 737-7777

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

APPENDIX

TABLE OF CONTENTS TO APPENDIX

PAGE

Federal Trade Commission Complaint ..... App. 1

Initial Decision of Hearing Examiner ..... App. 8

Final Order of Federal Trade Commission ..... App. 20

Excerpts From Proceedings Before Hearing Examiner ..... App. 23

- Colloquy ..... App. 23
- Testimony of Albert R. Bell ..... App. 29
- Testimony of Nathan Braverman ..... App. 31
- Testimony of Maurice Lagnado ..... App. 39

Spiegel's Exhibits ..... App. 41

Opinion of the Court of Appeals for the Seventh Circuit ..... App. 45

Order of Court of Appeals Denying Petition for Rehearing ..... App. 60

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Spiegel, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Spiegel, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2511 West 23rd Street, Chicago, Illinois.

PARAGRAPH TWO: Respondent is a catalog retailer and is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires and various other articles of merchandise.

PARAGRAPH THREE: In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other states of the United States and the District of Columbia, and maintains, and at all times mentioned herein has maintained,

a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: For the purpose of inducing the purchase of said products, respondent has made various statements in certain of its circulars and seasonal catalogs respecting merchandise being offered for a free trial or at a reduction in price.

Among and typical, but not all inclusive of said statements, are the following:

A. ON CATALOG SENT TO NEW CUSTOMERS:
30 DAY FREE TRIAL
SEND NO MONEY

TRY BEFORE YOU BUY

These outstanding values are yours to try for 30 Days Free! You're invited to order any item that you would like to see and use . . . without risking a penny . . . without obligation to buy. Send No Money . . . list your selections on the special order blank enclosed in this 30 DAY FREE TRIAL OFFER!

SEND NO MONEY!

Try any of these values 30 days FREE!

B. ON CIRCULAR SENT TO ESTABLISHED SPIEGEL CUSTOMERS:

Dear Customer:

You're invited to see and use any or all of the enclosed 20 outstanding values in your home for 30 days FREE! Each item is of the high quality that Spiegel customers have come to expect and prices are the lowest we can offer. We want you to try them *at our*

risk, free from pressure or persuasion, with absolutely no obligation to buy!

DON'T SEND A PENNY . . . just make your selections, fill out the order blanks and mail them in the enclosed postage-free envelope.

SEND NO MONEY! Just choose the items you wish to try . . . fill out and sign the order blanks . . . detach and mail them to us. We'll rush your merchandise to you. After you've checked the performance and beauty of these items (and compared prices anywhere), we're confident you'll be delighted and want to keep them. However, if for any reason you are not completely happy, send them back and we'll even pay the return postage. No questions asked. If you do keep the merchandise we'll add the amount to your Spiegel Budget Power account.

C. ON CIRCULAR TO NEW CUSTOMERS:

25% OFF!
on everything we sell . . .
25% off on your first credit order!

What better way to get our cash customers to try the Budget Power Credit Plan than to offer *25% off* on the FIRST CREDIT ORDER ONLY?
—Naturally to be accepted for a Spiegel Budget Power account, you must be steadily employed, reside at a permanent address, and have a good record.

PARAGRAPH FIVE: Through the use of said statements and representations, and others of similar import and meaning but not specifically set out herein, respondent has represented, and is now representing, directly or by implication, that the free trial offer and the 25% discount offer are available without condition or restriction to anyone receiving such offers.

PARAGRAPH SIX: In truth and in fact, the offers of a free trial and of 25% off are not available without condition or restriction to anyone receiving such offers since:

(a) Such of these offers as are directed to new Spiegel customers are not available and the merchandise is not shipped to them unless and until they qualify for credit under Spiegel's credit standards;

(b) Such of these offers as are directed to established Spiegel credit customers are not available and the merchandise is not shipped to them if the total price of the merchandise ordered when added to the customers' pre-existing credit charges exceeds the total amount of the credit which Spiegel had previously determined to allow such customers under its "Budget Power" account; and

(c) Spiegel does not accept orders from persons in certain geographical areas where it has experienced high credit losses unless the person is an established credit customer whose account is not delinquent.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PARAGRAPH SEVEN: In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires and various other articles of merchandise of the same kind and nature as that sold by respondent.

PARAGRAPH EIGHT: The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PARAGRAPH NINE: The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Wherefore, the premises considered, the Federal Trade Commission on this 8th day of November A.D. 1971, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 29th day of December A.D. 1971, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Pennsylvania Avenue, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or

before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed

order provisions as to Spiegel, Inc. might be inadequate fully to protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

It Is Ordered that respondent Spiegel, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires and various other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Representing, directly or by implication, that merchandise is being offered on a free trial basis or at a percentage or amount off the usual and regular price unless all restrictions or conditions applicable to such offers are clearly and conspicuously disclosed in immediate connection therewith.

2. Representing, directly or by implication, that any offer of a free trial of merchandise, of a reduction in price in merchandise, or of any other kind is made or is available without conditions or restrictions when such offer is actually subject to conditions or restrictions not revealed therein.

It Is Further Ordered that the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and

its official seal to be hereto affixed at Washington, D.C., this 8th day of November A.D. 1971.

By the Commission.

/s/ Charles A. Tobin
Charles A. Tobin,
Secretary.

(SEAL)

INITIAL DECISION

(Filed: June 23, 1972)

By David H. Allard, Hearing Examiner.
Charles W. O'Connell,
Counsel Supporting the Complaint.

Jacob A. Stein, Washington, D.C., and
Martin W. Bell, Washington, D.C.,
Counsel for Respondent.

PRELIMINARY STATEMENT

The Federal Trade Commission on November 8, 1971, issued its complaint in this proceeding, charging Spiegel, Inc., a corporation, with violating Section 5 of the Federal Trade Commission Act.

A hearing was held at Chicago, Illinois on April 18, 1972. At that hearing, testimony and documents were incorporated into the record in support of the complaint as well as in opposition thereto. This proceeding thus is before the hearing examiner upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions, and briefs in support thereof submitted by the parties have been carefully considered by the exami-

ner, and those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

The sole issue in this proceeding, as stipulated by the parties, is whether Spiegel's advertisements of free trial offers are unfair or deceptive because of the manner in which consumers are notified of respondent's requirement of credit approval in order to obtain the benefits of such offers. [1]

Having heard and observed the witnesses and having carefully reviewed the entire record [2] in this proceeding, together with the proposed findings, conclusions, and briefs submitted by the parties as well as replies, the examiner makes the following findings as to the facts, conclusions, and order:

FINDINGS OF FACT

1. Respondent Spiegel, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws

---

[1] At the prehearing conference on March 7, 1972, the following stipulation was agreed upon by the parties. This stipulation set forth the only issue in the proceeding.

> "Credit approval is the only qualification or condition by Spiegel, Inc. with respect to free trial offers advertised * * *. As a corollary to that, and it would remain the issue, is the manner in which Spiegel notifies the consumer of the need for credit approval such that, it requires the issuance of an order." (Prehearing Conference pp. 75, 76; see also CX 1-A-B)

[2] References to the record are made in parenthesis, and certain abbreviations are used as follows:

Comp. — Complaint
Ans. — Answer
Tr. — Transcript page
CX — Commission Exhibit
RX — Respondent Exhibit

of the State of Delaware, with its principal office and place of business located at 2511 West 23rd Street, Chicago, Illinois 60608 (Comp. par. 1; Ans. par. 6).

2. Respondent is a catalogue retailer. It is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, and distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires, and various other articles of merchandise (Comp. par. 2; Ans. par. 6).

3. Respondent had net sales in 1968 of $320,248,000 (CX 7, p. 14). It does business nationwide, strictly through catalogue sales (Tr. 22). Over 90 percent of Spiegel's business is in interstate commerce (Tr. 22).

4. As a method of merchandising its products, respondent has made various statements in certain of its circulars and seasonal catalogues in which it offered its merchandise for free trial or at a reduction in price.

A. *On Catalogues Sent to New Customers*

Among and typical, but not all inclusive, of said statements are the following, which appear on the face of almost all of the catalogues:

> "30 *DAY* FREE TRIAL
> SEND NO MONEY
> TRY BEFORE YOU BUY
>
> These outstanding values are yours
> to try for 30 days Free!
> You're invited to order any item
> that you would like to see and use . . .
> without risking a penny . . .
> without obligation to buy. Send
> No Money . . . list your selections
> on the special order blank enclosed
> in this 30 DAY FREE TRIAL OFFER!"
> (CX 1-C)

(1) Catalogues sent to prospective credit customers are referred to internally by Spiegel, and hereinafter, as "hot merchandise" catalogues (Tr. 23).

(2) The hot merchandise catalogues are sent out weekly from January through November each year and the number totals 40 million annually (Tr. 42).

(3) Names of persons to whom these catalogues are sent are obtained from mailing lists which conform to Spiegel's demographic model (Tr. 46).

(4) Respondent also makes general solicitation, without regard to demographic standards, by inserting hot merchandise catalogues in metropolitan newspapers. No particular criteria are used to determine which newspapers or which cities will receive distribution of the catalogues. The essential consideration is the cost of distribution (Tr. 83-84).

(a) CX 1-Z-25 is an example of a hot merchandise catalogue that was distributed in this manner to the *Cincinnati Enquirer* of February 15, 1970;

(b) RX 1-Z-40 with the *Chicago American* of August 3, 1969.

(5) About 75 percent of the hot merchandise catalogues go to Spiegel's prospective credit customers and 25 percent to cash customers (Tr. 53).

B. *On Circulars Sent to Established Spiegel Customers*

Among and typical, but not all inclusive, of said statements are the following, which appear in the cover letter to the circular.

"Dear Customer:

You're invited to see and use any or all of the enclosed 19 outstanding values in your home for 30 days FREE! Each item is of the high quality that Spiegel customers have come to expect and prices are the lowest we can offer. We want you to try them *at our risk,* free from pressure or persuasion, with absolutely no obligation to buy.

DON'T SEND A PENNY . . . just make your selections, fill out the order blanks and mail them in the enclosed postage-free envelope."

• • •

"SEND NO MONEY. Just choose the items you wish to try . . . fill out and sign the order blanks . . . detach and mail them to us. We'll rush your merchandise to you. After you've checked the performance and beauty of these items (and compared prices anywhere), we're confident you'll be delighted and want to keep them. However, if for any reason you are not completely happy, just send them back and we'll even pay the return postage—with no questions asked. If you do keep the merchandise we'll add the amount to your Spiegel Budget Power Account." (CX 1-Z-104)

(1) The free trial mailings to these customers consist of about 19 sheets, each of which offers an article of merchandise and has an order *blank attached.*

(2) A business reply envelope that requires no postage is also enclosed (Tr. 48).

(3) From 1,800,000 to 2,500,000 of these mailings (depending upon the number of solicitable accounts) are sent out ten or eleven times a year to respondent's credit customers (Tr. 48).

C. *On Circulars Sent to New Customers*

Among and typical, but not all inclusive of said statements are the following, which begins on the cover memorandum of the circulars.

"25% OFF!

on everything we sell . . .
25% off on your first credit order!
What better way to get our cash customers
to try the Budget Power Credit Plan than
to offer *25% off* on the FIRST CREDIT ORDER
ONLY?
—Naturally to be accepted for a Spiegel
Budget Power account, you must be
steadily employed, reside at a permanent
address, and have a good record."
(Comp. par. 4(c); Ans. par. 4(c); CX-1-Z-130)

(1) Two types of "25% off" circulars were utilized by respondent. One was sent to respondent's credit customers; the other to respondent's cash customers on file (CX 1-Z-130).

(2) This type of mailing was used in 1969 and up to July in 1970 when it was discontinued because it was unprofitable (Tr. 48-49). For that reason the practice will not be resumed (Tr. 73).

(3) Approximately 1,500,000 circulars were sent to credit customers, and 1,500,000 to cash customers (Tr. 49).

5. The order blank for each of these offers is treated by respondent as an application for credit (Tr. 79).

6. The application form always noted that the order was subject to acceptance by Spiegel (Tr. 73-74).

7. In truth and in fact, respondent's advertisements of offers of a free trial and of 25 percent off fail to disclose on their face that they are not available without condition or restriction because:

A. *Offers Directed to New Customers*

(1) Some of these offers are directed to new Spiegel customers, but the offers are not available and the merchandise is not shipped to these new customers unless they qualify for credit under Spiegel's credit standards (Comp. par. 6(a); Ans. par. 6(a)).

B. *Offers Directed to Established Credit Customers*

(1) Offers that are directed to each of Spiegel's established credit customers are not available and the merchandise is not shipped if the total price of the merchandise ordered, when added to the customer's pre-existing credit charges, exceeds the total amount of the credit that Spiegel had previously determined to allow such customer under his "Budget Power" account (CX 5).

(a) The customer has three choices: First, he can reduce the amount of the order; second, he can pay the difference between the amount of available credit and the total amount of the order; and third, he can make another selection which would not exceed the amount of available credit (Tr. 64-65).

(b) An established credit customer who receives mailings, illustrated by CX 1-Z-57 thru 129, must have

his account up to date; he must have made required monthly payments on time; and he must also have had an account less than 12 months previous to the free trial order (Tr. 66).

C. *Two Categories of Language Used in Advertisements*

(1) The following conditional language, which falls into two categories, summarizes the language in respondent's advertisements:

(a) On the face cover of the Spring and Summer '72 catalogue:

"All orders subject to Spiegel
Credit Approval" (RX 1-Z-68).

(b) On the order blank section appearing as a middle insert to the catalogue:

1. The first two or four pages contain an open letter from Spiegel inviting sales and to "TRY BEFORE YOU BUY!"

   a. "All orders are subject to our acceptance." (CX 1-0, CX 1-Z-39, CX 1-Z-132, CX 6e).

   b. "Of course, all orders are subject to our acceptance but be sure to check how you wish to pay on the back of the order blank." (RX 1-N, RX 1-Z-24)

   c. "All orders are subject to acceptance by Spiegel and we cannot accept any dealer orders." (RX 1-Z-11)

   d. "—Naturally to be accepted for a Spiegel Budget Power account, you must be steadily employed, reside at a permanent address, and have a good record."
   (Comp. par. 4(c); Ans. par. 4(c))

e. "Of course, as with all merchants, we reserve the right to accept or reject any order according to our credit standards." (RX 1-Z-87)

f. "Subject to credit approval by Spiegel." (RX 1-Z-88)

2. The order blank:

a. "To open a Spiegel account and save 25% you must answer all questions on the other side." (RX 1-Z-10)

3. The credit application:

a. "I understand this order is subject to your acceptance . . ." (RX 1-Z-53)

b. "All orders subject to acceptance by Spiegel." (RX 1-Z-11)

8. In the course and conduct of its business, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires, and various other articles of merchandise of the same kind and nature as that sold by respondent (Comp. par. 7; Ans. par. 7).

CONCLUSIONS

1. The use by respondent of the aforesaid statements, representations, and practices has had and now has the capacity to mislead members of the purchasing public into the purchase of substantial quantities of respondent's products.

(a) Net sales generated by hot merchandise catalogues were estimated to be $27 million in 1969, $27 million in 1970, and $30 million in 1971 (Tr. 52).

(b) The record shows that estimated mailings of free trial offers to established credit customers ac-

count for $30 million in sales annually for respondent (Tr. 72).

2. An advertisement must be truthful. Its representations should be reasonably free of erroneous or misleading statements. To comply with the Federal Trade Commission Act, an advertisement must be akin to a passport for the complete truthfulness of the statements contained therein. Where, as here, conditions to offers exist, unsophisticated clues to the conditions should be as obvious on the face of the advertisements as the inducing offers themselves.

3. Respondent's failure to make reasonably complete disclosures on the face of the catalogues or circulars of credit conditions, restrictions, or limitations applicable to free trial offers, generally has the tendency and capacity to mislead prospective credit customers mistakenly to believe that the offers are available without qualification to anyone who accepts them. Free trial offers, of course, do not involve a credit transaction unless credit is specifically requested. The simple disclosure on the cover of the Spring and Summer '72 catalogue that "all orders are subject to Spiegel credit approval" fails to adequately inform prospective customers what the real impact of the message is. From the lure of free offers on the cover, even established credit customers are not put on notice about further limitations and restrictions which would make their orders unacceptable to Spiegel. Examples of such limitations and restrictions are: orders exceeding the total amount of credit Spiegel determines to allow the customer; the fact that a customer's account must be up-to-date; the fact that monthly payments must be paid regularly by the customer; and that the customer's account must have been active within a 12-month period prior to the time the customer attempts to take advantage of a

free trial order. These conditions appear inside the catalogue or circular, far removed from the enticing offers on the cover. New customers would be even less circumspect.

4. Respondent's advertisements of free trial offers are deceptive and unfair and in violation of Section 5 of the Federal Trade Commission Act because of the manner in which customers are notified of respondent's requirement of credit approval in order to obtain the benefit of the offers. In reaching this inescapable conclusion, the hearing examiner has evaluated respondent's practices in light of the capacity of the advertisements to deceive, and their inherent unfairness, and not on the basis of a demonstrated injury to purchasers. *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666 (7th Cir. 1967); *Charles of the Ritz Distributors Corp.* v. *FTC*, 143 F.2d 676 (2nd Cir. 1944).

5. The aforesaid acts and practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The deception of purchasers constitutes unfair competition. *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483 (1922).

ORDER

IT IS ORDERED that respondent Spiegel, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of clothing, household appliances,

kitchenware, bedding, furniture, radios, luggage, tools, tires, and various other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

> Representing, directly or by implication, that merchandise is being offered on a free trial basis or at a percentage or amount off the usual and regular price unless substantially all credit restrictions or conditions applicable to such orders are clearly and conspicuously disclosed in reasonably immediate connection therewith.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that the respondent notify the commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

IT IS FURTHER ORDERED that respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

David H. Allard
Hearing Examiner.

June 23, 1972

FINAL ORDER

This matter is before the Commission upon the cross-appeals of complaint counsel and respondent from the administrative law judge's initial decision filed June 23, 1972, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that complaint counsel's appeal should be granted and respondent's appeal denied and that the initial decision as modified by this order should be adopted as that of the Commission:

It Is Ordered that the appeal of complaint counsel be, and it hereby is, granted and the appeal of respondent be, and it hereby is, denied.

It Is Further Ordered that the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It Is Ordered that respondent Spiegel, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires, or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, to prospective credit customers that merchandise is being offered on a free trial basis, or at a percentage or amount off the usual and regular price, unless respondent clearly and conspicuously discloses in immedi-

ate conjunction with such offer that it is subject to respondent's credit approval.

2. Representing, directly or by implication, to respondent's established credit customers that merchandise is being offered on a free trial basis unless respondent clearly and conspicuously discloses in immediate conjunction therewith any credit restriction or condition which would make a customer ineligible to qualify under such offer or any other restriction or condition applicable to such offer.

3. Failing to clearly and conspicuously disclose at the top of questionnaires requesting information from prospective credit customers ordering merchandise pursuant to a free trial offer or other offer that it is an application for credit and that merchandise will be sent to the prospective customer only if such customer is approved for credit by respondent.

4. Representing, directly or by implication, that an offer of a free trial of merchandise, a reduction in the price of merchandise, or any other kind of offer is made or is available without conditions or restrictions when such offer is subject to conditions or restrictions not revealed therein.

It Is Further Ordered that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It Is Further Ordered that the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

It Is Further Ordered that respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It Is Further Ordered that the initial decision, as modified by this order, be, and it hereby is, adopted as the decision of the Commission.

By the Commission. Chairman Kirkpatrick submitted a separate statement.

Charles A. Tobin
Secretary.

(Seal)

Issued: January 9, 1973

Attachment:
Separate Statement by Chairman Kirkpatrick.

Separate Statement of Commissioner Kirkpatrick

I cannot agree that consumers would fail to appreciate that Spiegel's free-trial offers necessarily were subject to acceptance by Spiegel. The nature and amount of information obtained by Spiegel on its application forms, in my opinion, puts the consumer on notice that Spiegel has established criteria which prospective customers must meet prior to receiving the merchandise on a free-trial basis. It seems to me unlikely that a consumer would conclude that the information provided on the application form was irrelevant to Spiegel in deciding whether or not to provide the consumer with the offered merchandise.

Of course, it is arguable that some few prospective customers who sent in filled-in application forms may not have fully understood the conditional nature of the offer.

Also, I appreciate that economic injury is not always a condition precedent to an order under Section 5. However, in the circumstances of this case where no economic loss of any consequence appears and where no testimony was received with respect to consumers' understanding of the import of the application forms or whether Spiegel's disclosures were in fact sufficient, then entry of an order is not warranted.

January 9, 1973

[24] TRANSCRIPT OF PROCEEDINGS BEFORE HEARING EXAMINER

December 29, 1971

* * *

Hearing Examiner Moore: Let me ask you, Mr. O'Connell you have the stock language in paragraph 8 of the complaint, that the use by Respondent of the aforesaid false misleading and deceptive statements, representations and practices, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of Respondent's products, by reason of said erroneous and mistaken belief.

Now, say recognizing this is a stock or standard boilerplate allegation, and deceptive practice case, is this the injury you are claiming?

It seems to me, in the light of the complaint and answer, and the comments we have had this morning, that it does not lead the consumer into the purchase of substantial quantities of Spiegel products, and you are complaining that they turn people down, that they initially invite to deal with them.

Is this literally the case here, that the challenged advertising promotes substantial quantities of Respondent's [25] products?

Mr. O'Connell: No, that is not accurate, under this complaint.

Hearing Examiner Moore: Let's address ourselves to Mr. Stein's question, and allegations here, that as to what is the public injury claimed here.

Who is hurt and how?

Mr. O'Connell: There does not have to be any showing of hurt or injury.

Hearing Examiner Moore: Maybe not any showing, but what, how do we draw an inference that there is an injury, from these practices, or what is the theory of the Government's case in that regard?

Basically, who is injured, and how are they injured?

Mr. O'Connell: Well, I would rather put it in these terms, who is misled, or who would have a tendency to mislead.

Hearing Examiner Moore: All right.

Let's get to that first.

I think we may have to pursue that a little further.

Mr. O'Connell: The free trial offer is broadcast, and to people that Spiegel does not know, has had no previous dealings with, and the offer is sent on the basis of lists, [26] that they obtained.

It purports to offer on its face a 30-day free trial of the items that are in these so-called hot merchandise catalogs that are sent out each spring and fall.

In reliance on that offer, the prospective, the person who accepts the offer, has reason to believe that by sending requests, requesting that to be sent, on the basis of this statement, of a free-trial offer, that it will be sent to him forthwith, for a free trial, and, furthermore, in connection

with the free trial offer, which appears throughout, on the cover of the catalog, and throughout each page, there is no indication that this is made subject to qualifying for Spiegel credit, so you have the result that persons are misled into believing that they can get a free trial offer, and they have an opportunity to look at the goods, and decide whether they want to buy them, and this is not true.

Hearing Examiner Moore: And then if they are turned down, if in individual cases Spiegel does not approve the extension of credit, and the sending of the free trial merchandise, how is such a person injured, what is the detriment to him, beyond his disappointment at not being able to get the merchandise on this basis?

Mr. O'Connell: There is no monetary injury to him, [27] no, he has not paid for anything, true, but he has been led to believe he could obtain this free trial offer, and it was not given to him.

An advertiser does not have the right to make offers without explaining that there are conditions to it which will prevent a person receiving this offer from realizing it.

Hearing Examiner Moore: What is the Government proffering to show as to the percentage of individuals circularized at any given time with such an offer and the ratio between the total number of circularized, and the number refused?

Mr. O'Connell: Well, I cannot say exactly as to that, but I think we can show on the basis of the policies and practices of Spiegel, that they have a great number of people who will not be extended credit, just because of their occupation, for example, or maybe, because of a geographical area, people are suspect, so it will be shown that there is a considerable percentage of people that are turned down, and this is necessarily so, because of the way they send these out on the basis of lists, and they send out on each free trial catalog, they send out on the basis of a

new listing, they do not want to repeat, they are trying to get credit customers.

That is the object of it.

Hearing Examiner Moore: What is the public interest [28] here in restricting them from making these offers, some of which they decline to make good on?

If a consumer who applies for one of these, for delivery of merchandise, under one of these offers, and he is refused, for reasons which may be of, well, which may be sufficient to Spiegel, maybe it is a reasonable business judgment, what is the public interest in dealing with this?

It has not cost the consumer anything, except the time and effort of filling out whatever coupon or postcard he has to fill out and dropping it in the mailbox.

As I understand it, these are prepaid communications that are sent in in response to these offers, is that right?

As far as the postage, is that what you said, Mr. Stein?

Mr. Stein: We provide the postage.

Hearing Examiner Moore: So what is the public injury, or what is the public interest in stopping a practice of this kind, conceding arguendo, that because of failure to reveal all of the terms and conditions, when the offer is first made, that a man, or a person might be misled, he thinks he is automatically entitled to get this, when in fact he is not.

Why should the Commission spend time and public money in prosecuting a practice of this kind?

[29] Say your stock language in your complaint does not fit, at least on the surface. I think this would be open to some argument, but the fact that this does not really lead to mislead the consumer, or prospective consumer, does not lead him to buy this product, so that—

Mr. O'Connell: Well, it may, in a sense that he is an unsuspecting target for this advertising, and will be a credit customer as a result of it.

Hearing Examiner Moore: Except that your complaint is that the people that you are concerned about do not get in that situation, do not get in that position of a Spiegel customer, because they are turned down.

Let me say, I am sure both Counsel on both sides are experienced enough, that they are not misled by comments from the bench in a case of this kind.

This does not represent any prejudgment, or any determination by the Examiner, as to these matters.

I am trying to get informed as to the respective positions of the parties, do not think that because I ask questions of that kind, that I necessarily am taking on the role of an advocate.

Mr. O'Connell: Of course, I might respond to what is the public interest in this matter, by the easy answer that the Commission has seen fit to issue this complaint on the [30] basis of the allegations therein.

Hearing Examiner Moore: That's an answer at this stage.

I have no right to sit in judgment on that determination until I hear evidence, the Government's evidence, but the cases make clear that the public interest in the issuance of a cease and desist order is a justiceable [*sic*] issue, within the province and jurisdiction of the Hearing Examiner.

This was made clear some years ago in the Florida Citrus Mutual Case, and in the Premier Pillow Case, that prior to hearings, the Examiner cannot overrule the Commission's determination, and preliminary determination of public interest, but it does get involved in the merits of the case, and in the determination, whether the public interest requires an order of cease and desist.

Again, in saying that, I am not forecasting what determination this Examiner might make in this case, but it is a matter that he will have to wrestle with.

Mr. O'Connell: Well, if we turned the thing over as an unfair practice to the public, it might be clear the public should not be subjected to offers which are deceptive.

They have a right not to be bothered with this type of thing, unless they are given all of the facts, or unless they are apprised that this is actually an invitation to file an [31] application for credit.

Hearing Examiner Moore: Let me get one thing clear here.

Now, I recognize that your position here is that, as it is spelled out in paragraph 4(c) of the complaint, where you have a statement of certain basic limitations or qualifications in order to be accepted for a Spiegel Budget Power Account, now, is it the position of Respondent that throughout these offers that some explicit representation is made that this of course is subject to your approval, that your application under one of these offers is subject to Spiegel's approval, as to your credit rating, and perhaps other things?

Mr. O'Connell: Is it my position that where each of these free-trial offers is made, that that has to be disclosed?

Hearing Examiner Moore: Well, I was addressing this initially to Mr. Stein, as to Respondent's position as to that, as to whether this, is a full disclosure of any limitations or conditions, must be included in any offer of this kind?

Is this basically the Government's position?

Mr. O'Connell: That has been the Government's position in previous cases, in regard to the use of free, that the conditions and limitations of the offer must be set [32] forth.

Now, in this particular case, it would probably be an impossible task to set forth all of the conditions and re-

strictions, but certainly, it should be required that whenever a free trial offer is made, that the customer, prospective customer is apprised at that point that this is subject to credit approval, and that means that everytime that free trial offer is made, on each page, or with respect to each article of merchandise, and on the cover of the catalog, or wherever it might appear, this notice should be given to the person, who has received the catalog.

* * *

TRANSCRIPT OF PROCEEDINGS BEFORE HEARING EXAMINER April 18, 1972

P R O C E E D I N G S

Hearing Examiner Allard: The hearing will come to order.

This is the time and place set by the Federal Trade Commission for the hearing in the matter of Spiegel, Inc., Docket No. 8869.

Who appears in support of the Complainant?

Mr. O'Connell: Charles W. O'Connell.

Hearing Examiner Allard: And who appears in behalf of the Respondent?

Mr. Stein: Jacob A. Stein.

* * *

[18] MR. BELL was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Hearing Examiner Allard: Witness has been sworn. You may be seated.

Direct Examination

By Mr. O'Connell:

Q. Mr. Bell, what position do you hold with Spiegel, Inc.?

A. I am a vice-president, secretary and counsel.

Q. And how long have you been in this position?

A. About . . .

Q. Approximately?

A. About 34 years.

• • •

[25] Q. Now, turning to what has been referred to as percent off offers and this is illustrated by Commission's Exhibit G in Commission's Exhibit 1, for identification, do you know how many of these are sent out in a year and how many times they are sent out?

A. I do not.

Q. Who would be able to supply that information?

A. Mr. Braverman may be able to supply the answer.

Q. I will—is this a program of mailing that is still going on with Spiegel, do you know?

A. It's not.

Q. It's not?

When was it used?

A. I can't give you the date.

Q. When was it discontinued?

A. I can't give you an accurate answer on that—I'd say a year or more ago it was dropped.

Mr. Braverman may give you a more accurate answer.

Q. Do you know why it was dropped?

A. Yes.

Q. Why?

A. It was unprofitable.

Q. By that you mean what—unprofitable?

A. It was not profitable to the company in the sense that the response received and the merchandise sold did not produce a profit to the company.

• • •

[40] Hearing Examiner Allard: The hearing will come to order.

Call your next witness, Mr. O'Connell.

[41] Mr. O'Connell: Mr. Braverman, please.

Hearing Examiner Allard: Mr. Braverman, come forward, please, raise your right hand, please.

MR. BRAVERMAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Allard: Witness has been sworn, you may be seated, sir.

Direct Examination

By Mr. O'Connell:

Q. Mr. Braverman, what position do you hold with Spiegel, Inc.?

A. Executive vice-president in charge of marketing.

Q. What are your functions and duties?

A. My functions are to obtain new customers and keep the old.

Q. How long have you held this position?

A. This particular position and title for approximately six years, but basically in this position for 25.

Q. Now, in obtaining of new customers, what do you have to do generally?

A. Generally have to make a mailing.

Q. Uh hum.

And are you involved in the mailing of the so-called [42] hot merchandise catalogs to prospective credit customers?

A. Yes, I am.

Q. And how are you involved in that?

A. I am responsible completely for it.

Q. I see.

• • • •

[43] Q. How many times do you mail out these catalogs?

A. Innumerable times—every week.

Q. Oh, well, that explains it.

Now, to whom are these mailed?

A. Prospects.

Q. Where do you get the names of prospects?

A. I select them from various lists.

Q. Are these selected on a particular basis?

A. They are selected on a particular basis.

Q. What is that?

A. They are selected on the basis of the demographics of the market that I believe Spiegel should be appealing to.

• • •

[48] Q. Now, in regard to the advertisements with the percent off offers, 25 percent off, do you presently use those?

A. No, we do not.

Q. When did you stop using them?

A. I believe that the last usage was in—this is—I am guessing now, but I think pretty accurately—about July of 1970.

Q. Uh hum.

And how many of those or—strike that.

To whom were these sent?

A. There were two kinds—one kind was sent to our [49] credit customers already in our file.

Another kind was sent to our old cash customers already in our file.

Q. Cash customers?

A. (Nodding.)

Q. And why were you sending those to your cash customers?

A. In an attempt to see whether any of them would want to become our credit customers.

Q. Can you give me a figure as to how many of these were mailed out at any one mailing?

A. As to the credit customers, approximately speaking in 1969 I would have to guess at around a million five, a million eight; as to cash customers, probably about a million five I would imagine.

Q How many years was that used prior to 1970 when you quit?

A. One year.

Q. One year?

A. Only used, I believe in '69 and 1970, I think.

Q. Why did you stop using this method of advertising?

A. Not profitable.

Q. In what respect?

A. The net sales to the business, after expenses, did not warrant the expenditure.

• • •

[55] Q. In regard to Commission's Exhibit A, can you determine what year that might have been sent out or what season of the year?

A. This was a spring season.

Q. Which year?

A. This says up here spring 1969, so I assume that is it.

I'd have to see the other four page enclosure to really tell.

Q. Is the order blank missing in there?

A. Yes, the order blank is missing in here—it's not complete.

• • •

[59] Q. In what way does this differ from your present policy?

A. I think an analysis would indicate that the credit passing rules today are different than they were in 1968.

Q. In what way?

A. Probably different points, different weights being given to the various factors involved.

• • •

[67] Q. Now, assuming that one of your mailings of the hot merchandise catalog was responded to by a person who is say age 74, what would you do in respect to his order?

A. I'd—I don't know whether the specific question is age 74.

If you are asking me about a customer of a specific age, any age would have no significance whatsoever.

Q. The age 74 doesn't mean anything to you?

A. Not that I can recall—it's only one factor in the equation.

Q. But it's something you take into consideration?

[68] A. It's a factor to be related to all other factors—what we call a statistical multiple correlation analysis.

• • •

[73] *Cross Examination by Mr. Stein.*

Q. Mr. Braverman, do you have any intention to resume the percent off plan?

A. Not at all.

Q. It's your testimony that you always include an application card in all these ads?

A. Yes, sir.

Q. What is the terminology you use with respect to that card so I can use it and have it accurate?

Do you have a fixed term that you give it—an application blank or what is it called?

A. Yes, it's the—it's the order application blank.

Q. And that is included in every ad?

A. Yes, sir.

[74] Q. And every order application blank from let's say 1967 on has had the statement in it, as far as you know, subject to Spiegel's approval or language of that kind?

A. Yes, sir.

Q. And . . .

Mr. O'Connell: Well, are these reflected . . .

Mr. Stein: Let us continue my examination.

By Mr. Stein:

Q. I have some exhibits which were our exhibits. I wonder if you'd go through them—I am going to show you Exhibit 1 and ask you when that—when that advertisement was used?

A. Spring 1970.

Q. Would you go to Exhibit 2 and tell us when that one was used?

A. Exhibit 2?

Q. Yes.

A. Also spring 1970.

Q. All right.

Would you go to the next one, number 3?

A. Exhibit 4—I don't see Exhibit 3 here.

Q. It's behind the other one.

We will pass it for the moment—four.

A. Exhibit 4, this was used in fall 1969.

Q. Here is 3—it's in the wrong order.

[75] A. Spring 1970.

Q. Here's five.

A. Fall season, fall 1969.

Q. Show you No. 6.

A. Spring 1972.

Q. Now is this what you are currently using?

A. Yes, it is.

Q. And all your advertisements carry all orders subject to Spiegel credit approval?

A. Yes, they do.

Q. Now, this appears on the front in fairly bold type and there are other qualifications within the exhibit which are available for them to examine.

With respect to putting this prominently on the front, why did you change it and put it more prominently now?

A. Only because my understanding that this is what the Commission wanted and I didn't think—I think it's erroneous or wrong as can be—I said okay, if this is what you fellows are asking me, quit bothering me and I put it on.

Q. Do you watch the ads of your competitors?

A. Certainly do.

Q. Do any of your competitors carry such a legend?

A. No.

Mr. O'Connell: Objection, irrelevant.

[76] Hearing Examiner Allard: Objection sustained.

By Mr. Stein:

Q. In your job you are interested in selling merchandise, are you not?

A. Yes, sir.

Q. And when you make a decision to refuse to sell, if such a decision is made, that is made reluctantly, isn't it?

* * *

The Witness: It's my job.

I said I am an executive vice-president in charge of marketing, including selling and my job is to sell.

By Mr. Stein:

Q. And the philosophy underlying this is to make as many sales as possible, isn't it?

A. Absolutely.

Q. You don't receive any applications pursuant to these orders except on the application blanks which is included, isn't that true?

A. That is correct.

Q. And the application—the application blank that [77] comes in must be signed, isn't that true?

A. Yes, it must.

Q. And a decision about granting or withholding credit is based on many factors, isn't that true?

A. The relationship of many factors.

Q. And those factors are continually changing, isn't that true?

A. Yes, they are.

Q. And some factors rise in importance and some decrease in importance over the years, isn't that true?

A. That is correct.

Q. And what was important two years ago maybe in an area is unimportant today, isn't that true?

A. Yes.

Q. And to put all these factors in a legend or an ad would require a book of ten or 12 pages or perhaps more, isn't that true?

A. It's so true it's now being done on computers.

Q. The factors that go into advertising?

A. Yes, sir.

Q. And isn't it true that manuals in this field as to what goes into granting and withholding credit sometimes run 200 pages?

A. This I don't know for sure.

Q. You have seen manuals of over 50 pages, haven't you?

[78] A. Oh, yes, absolutely.

Q. And you say much of the information now is placed on a computer?

A. Yes.

Q. Is it commercially possible to supply all this information on an advertisement?

A. It's not—it's not even—it's not possible at all.

Q. Have you ever seen an advertisement which contained all the factors which go into credit?

A. I have never seen an advertisement of any kind showing any factors other than Spiegel.

Q. And the only factor that you deal with is a judgment as to whether the person to whom you want to sell is such a person that the credit risk is one that you want to take?

A. Yes, sir.

Q. And that varies sometimes?

A. Yes, it does.

Q. It may vary from the time you make the offer up to the time the order is received, isn't that true?

A. Quite often.

* * *

[79] *Redirect Examination by Mr. O'Connell.*

* * *

[80] Q. Let's assume the applicant doesn't put what his present earnings are.

What would you do when you receive the application?

A. They'd look at all the other questions, assign their various relationships, the computer would then assign the points for those and the points for the no answer for that particular question based upon the other questions.

* * *

[81] Q. Let's assume the person doesn't put his phone number.

A. He will get certain points for not putting the phone number down.

Q. Will the order be sent to him?

A. I don't know—I don't know what the other points are of the application.

Q. Why is the lack of phone number important?

A. I don't know.

I don't know—it's statistically valid, the phone number in relation to the other things or yes phone number in relationship to the other things.

These all change and vary—that is why the computer must do this.

• • •

[84] Hearing Examiner Allard: Are the envelopes attached to the order blanks always self-addressed and stamped?

The Witness: Yes.

Hearing Examiner Allard: They don't require postage?

The Witness: No, sir.

Hearing Examiner Allard: In all categories?

The Witness: All categories.

• • •

AFTERNOON SESSION—2:00 p.m.

[94] Hearing Examiner Allard: The hearing will come to order.

Mr. O'Connell, call your next witness.

Mr. O'Connell: Mr. Lagnado, please.

• • •

MAURICE LAGNADO was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Allard: The witness has been sworn.

You may proceed.

Direct Examination by Mr. O'Connell.

Q. Mr. Lagnado, what is your first name, please?

[95] A. Maurice.

Q. And what position do you hold with Spiegel, Inc.?

A. Assistant Treasurer.

Q. How long have you been assistant treasurer?

A. Six years.

Q. What are your duties in that position?

A. My duties involve treasurer's duties.

In addition to that it involves currently credit policies.

Q. How long have you been involved in credit policy?

A. About five months.

Q. And you succeeded Mr. Bird as stated by Counsel?

A. That is correct.

Q. Now, what—what functions do you have in regard to credit policies?

A. The development of policies needed to pass credit.

Q. And did you see whether or not the policies are carried out?

A. Oh, yes.

Q. You familiar with the credit procedures carried on by Spiegel granting credit to applicants?

A. I am familiar.

I have to refer to manuals we have, so . . .

Q. Now, in regard to manuals, are these the guiding manuals by which the persons who work for Spiegel in [96] analyzing credit refer to determine whether or not a given person should be granted credit?

A. Yes.

* * *

[112] *Cross Examination by Mr. Stein.*

Q. Mr. Lagnado, isn't it true that each individual case is weighed as a separate case when someone is being studied to determine whether a sale is going to be made—each case is studied on its own?

A. That is correct.

Q. The standards vary from time to time, also?

A. They vary and an application has a number of questions and these questions—these answers are given points and are related—you cannot go by any one particular answer.

[113] Q. And this is your department at the present time?

A. Yes.

* * *

RESPONDENT'S EXHIBIT 3

RX-1210

OPEN A SPIEGEL ACCOUNT AND SAVE **25% OFF** ON YOUR FIRST CREDIT ORDER ONLY

SPIEGEL

DATE _____ 19 ____

RESPONDENT'S EXHIBIT 3
AS PART OF STIPULATION
dated March 27, 1972.

TO OPEN A SPIEGEL ACCOUNT AND SAVE 25%
You must answer all questions on other side

IF NAME AND ADDRESS ARE NOT CORRECT AS SHOWN—PLEASE MAKE CORRECTION ABOVE

ORDERS MAILABLE To Your Town Are Shipped PARCEL POST. If order or items require freight or express depend on us to ship best way.

SATISFACTION GUARANTEED

SHIP TO ANOTHER PERSON OR A DIFFERENT ADDRESS? If you want order shipped to another person, or to yourself at different address than your home, fill in below:

Name _____

Address _____

Town _____ State _____ Zip Code _____

FOR PROMPT SERVICE PLEASE STATE SIZE, COLOR, STYLE AS REQUESTED.

NAME OF ARTICLE If furnished with initials, print initials	CATALOG NUMBER OF ARTICLE	COLOR or style, pattern, finish, etc.	SIZE width, etc. (shoes give AND width)	Quantity wanted	Price for one article, per, yard, etc.	TOTAL PRICE Dollars	Cents
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				
		color	size				

No need to figure any shipping/handling charges or tax. We will add them when we send your bill.

OFFER GOOD ONLY UNTIL FEB. 28, 1970

IMPORTANT! Be sure to fill out and sign other side!

REGULAR AMOUNT		
Deduct 25% If you wish we will figure discount for you		
YOU PAY ONLY THIS AMOUNT		

Minimum first credit order $15

S

RESPONDENT'S EXHIBIT 3 (Continued)

RX-12-11

just fill in and sign

25% OFF

on your first credit order

PLEASE PRINT— IF MARRIED, ANSWERS MUST APPLY TO HUSBAND

If married please print Spouses name

Phone number | Check One: Married / Single | Divorced or separated / Widow (er) | What is your age?

How many Children do you support? | How long with Present employer?

What kind of work do you do? | (If member of Armed Forces give rank and social security number)

Employer or Business. (Give name and address)

What are your present earnings $ | Please Check One: Weekly / Monthly / Yearly | Additional Income and what's it any $ | Please Check One: Weekly / Monthly / Yearly

Give 2 references (Stores, Finance Companies or Major Credit Cards)

1. Name of Firm | Complete Address | Acct. No.

2. Name of Firm | Complete Address | Acct. No.

OPEN A SPIEGEL ACCOUNT FOR ME and send me the merchandise listed. I have answered all the questions and signed below. I will pay the time sale price which is the cash price including shipping/handling charge, the Prudential Insurance Premium (if authorized below), state tax, if any, and the time price differential (monthly finance charge) according to your monthly terms set forth in your current catalog. Otherwise I will return the items and owe nothing. I understand this order is subject to your acceptance and that the validity and construction of this agreement shall be governed by the laws of Illinois.

Please Sign

For pennies a month (.0013 of beginning monthly balance), you can be safeguarded by Prudential Family Protection Insurance which will pay your account balance up to $2,500 in the event of the death of you or your spouse, or your permanent disability. A certificate will be sent, describing all benefits in full. Purchase of this insurance is not a factor in approving the extension of credit, and the insurance can be terminated at any time.

To Insure Your Account

PLEASE SIGN HERE _____ Date _____

You MUST use the SPECIAL ORDER BLANK on other side and answer Questions Above to get Your 25% Discount

Due to the tremendous discount—25% off on everything we sell—this offer must be limited to ONE-ORDER-PER-CUSTOMER. All orders subject to acceptance by Spiegel—and no cash order or dealer orders accepted. Offer Ends Feb. 28, 1970. Place your credit order now.

1. This is a great saving opportunity—GOOD ON YOUR FIRST CREDIT ORDER ONLY. Sorry, this discount does not apply to cash orders.
2. This special 25% Discount is good only until Feb. 28, 1970. Not one day longer. After that our regular low prices will again prevail.
3. We cannot honor this 25% DISCOUNT unless you use the enclosed special order blank. It already has your name and address on it and is not transferrable.
4. All orders are subject to acceptance by Spiegel . . . and we cannot accept any dealer orders.
5. Naturally, to be accepted for a Spiegel Budget Power Account you must be steadily employed, reside at a permanent address, and have a good record.

SATISFACTION GUARANTEED

Look at these Big Savings!

ORDER THIS MUCH	PAY ONLY THIS MUCH	SAVE THIS MUCH
$40	$30	$10
$60	$45	$15
$80	$60	$20
$100	$75	$25
$120	$90	$30
$200	$150	$50
$300	$225	$75
$400	$300	$100
$500	$375	$125

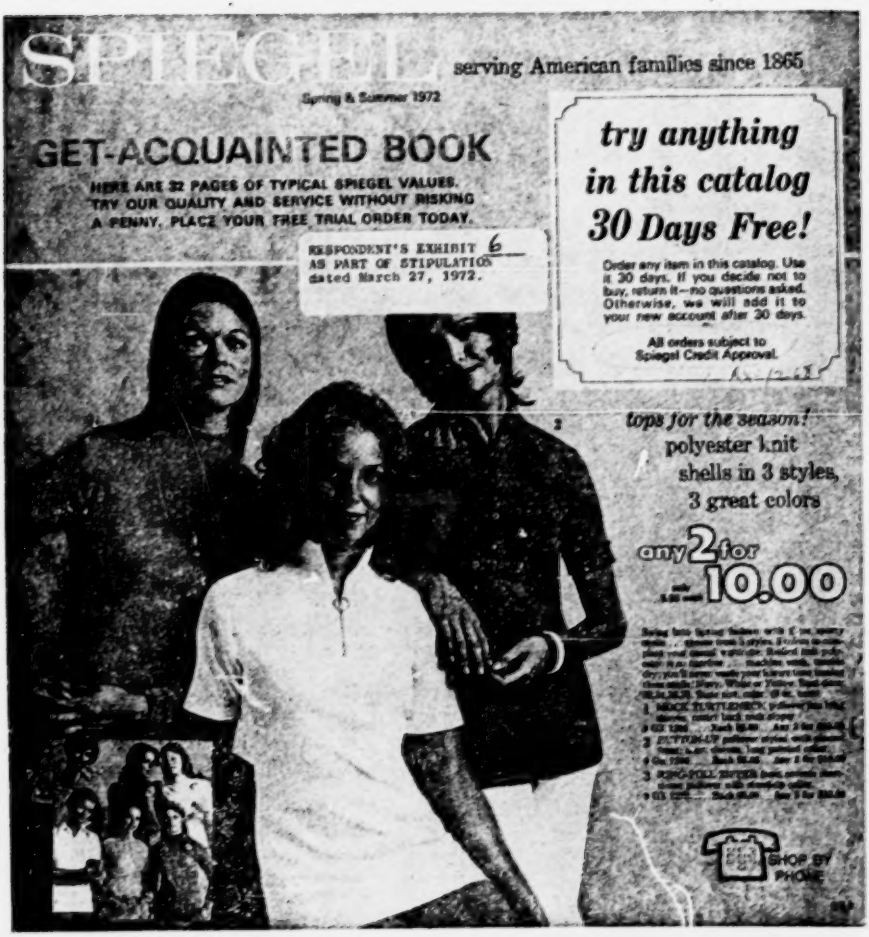
SPIEGEL

RESPONDENT'S EXHIBIT 5

SPIEGEL
ADVERTISING SUPPLEMENT TO
Chicago today American
RESPONDENT'S EXHIBIT 5
AS PART OF STIPULATION
dated March 27, 1972.
30 DAY FREE TRIAL
all 131 pieces
only $29.95
TRY BEFORE YOU BUY
These outstanding values are yours to try for 30 Days Free! You're invited to order any item that you would like to see and use... without risking a penny... without obligation to buy. Send No Money... list your selections on the special order blank enclosed in this 30 DAY FREE TRIAL OFFER!
SPIEGEL

[Cover page only]

RESPONDENT'S EXHIBIT 6


SPIEGEL
serving American families since 1865
Spring & Summer 1972
GET-ACQUAINTED BOOK
HERE ARE 32 PAGES OF TYPICAL SPIEGEL VALUES. TRY OUR QUALITY AND SERVICE WITHOUT RISKING A PENNY. PLACE YOUR FREE TRIAL ORDER TODAY.
RESPONDENT'S EXHIBIT 6
AS PART OF STIPULATION
dated March 27, 1972.
try anything in this catalog 30 Days Free!
Order any item in this catalog. Use it 30 days. If you decide not to buy, return it—no questions asked. Otherwise, we will add it to your new account after 30 days.
All orders subject to Spiegel Credit Approval.
tops for the season!
polyester knit shells in 3 styles, 3 great colors
any 2 for 10.00
SHOP BY PHONE

[Cover page only]

In the

United States Court of Appeals

For the Seventh Circuit

No. 73-1233 SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

SPIEGEL, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of a Final Order of the Federal Trade Commission

ARGUED OCTOBER 31, 1973—DECIDED MARCH 18, 1974

Before KILEY, *Senior Circuit Judge,* and PELL and SPRECHER, *Circuit Judges.*

KILEY, *Senior Circuit Judge.* The Federal Trade Commission ordered petitioner, Spiegel, Inc. to cease and desist from engaging in deceptive trade practices and unfair competition[1] in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(c).[2] Spiegel peti-

[1] Sec. 5(a)(6): "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [15 U.S.C. §45(a)(6).]

[2] Sec. 5(a)(1): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." [15 U.S.C. §45(a)(1).]

tions to have the order reviewed and set aside. We deny the petition and direct enforcement of the Commission's order.

Spiegel is a catalogue retailer of, among other things, clothing, household appliances and kitchenware, with principal office and place of business in Chicago, Illinois. During the relevant period prior to November, 1971, it shipped its merchandise, when sold, from Chicago into several of the United States. In its sales efforts it advertised for credit customers in circulars to "established" and "new" customers, and seasonal catalogues to "new" customers. The Commission's complaint, issued November 8, 1971, alleged that Spiegel's advertising practices were deceptive and unfair in violation of the Act, and that the complaint was "in the public interest."

The cease and desist order followed upon Spiegel's answer denying deception, a pre-hearing stipulation of facts, a limited evidentiary hearing before a Commission hearing officer, appeals to the Commission by both parties,[3] and the Commission's adoption, with modifications, of the hearing officer's decision.

The complaint alleged that the statements contained in circulars and seasonal catalogues which offered "free trial" or "percent off" of merchandise represented directly or by implication that the offers were available "without condition or restriction;" that "in truth and in fact" the offers of shipment to the "new" customers were conditioned upon the offerees qualifying for credit under Spiegel criteria; and that no shipments were made under the offers to the "established . . . credit customers" unless

[3] The Commission is both prosecutor and judge under §5 (45) of the Act. *FTC* v. *Klesner*, 280 U.S. 19, 27 (1929).

the amount of the purchases, added to the pre-existing credit charges of the purchaser, was less than the total credit amount Spiegel had previously allowed the customer.

The complaint charged that Spiegel's use of these alleged "false, misleading and deceptive statements" had the "capacity and tendency" to mislead the public into purchasing Spiegel's merchandise in reliance upon the truth of the statements "all to the prejudice and injury of the public and of [Spiegel's] competitors," and constituted unfair and deceptive practices and unfair competition in violation of the Act.

Spiegel's answer denied that the complaint was in the public interest, stated that the advertising followed the custom and usage of the trade, stated the alleged unlawful practices had been abandoned, and denied deception and injury to customers or competition.

The Commission's Final Order[4] directed Spiegel to desist from its "free trial" or "percent off" advertising practices as to prospective and established customers, unless it "conspicuously disclose[d] in immediate conjunction" with the offers that they are subject to Spiegel's credit approval; disclosed at the top of questionnaires requesting information about credit that the questionnaire is an application for credit; and disclosed any condition or restriction rendering an offeree ineligible to qualify for the offer. Finally, the order directed Spiegel to desist from representing directly or by implication that a free

[4] Commission Chairman Kirkpatrick dissented on the ground that the advertisements adequately notified the customers of the conditions and that where no substantial economic loss "appears" and no testimony of consumer misunderstanding was received, the order was not "warranted."

trial offer or price reduction is without condition when such condition exists.

I.

There is no merit in Spiegel's contention that the order should be set aside as too trivial for Commission attention because there was no proof of injury to the public or to Spiegel's competitors.

Protection of the public is essential to justify filing a Section 5 complaint. *FTC* v. *Klesner*, 280 U.S. 19, 27 (1929). However, proof of actual injury is unnecessary to support a Commission cease and desist order.

Significant in the examiner's decision, adopted by the Commission, are the statements that "an advertisement must be truthful. . . . To comply with the Federal Trade Commission Act, an advertisement must be akin to a passport for the complete truthfulness of the statements contained therein;" and that where, as here, the offers are conditioned, "unsophisticated clues to the conditions should be as obvious on the face of the advertisement as the inducing offers themselves."

The moral tone of those statements is implicit in Justice Cardozo's language in *FTC* v. *Algoma Co.*, 291 U.S. 67, 78-79 (1934):

> Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U.S. 212, 216; *Carlsbad* v. *W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be

> dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. . . . "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Comm'n* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494. The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down. (Footnote omitted.)

The primacy of truthfulness in advertising was made explicit in *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965), wherein the Supreme Court held that it was a deceptive practice to convey to television viewers the impression that they were watching an actual experiment when they were viewing only a simulation, notwithstanding the fact that the experiment had been conducted off-camera and the product had performed as represented. The Court stated, at 388-89:

> We find an especially strong similarity between the present case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and, as was stated in *Algoma Lumber*, a misrepresentation for such an end is not permitted.

The Ninth Circuit, citing *Colgate-Palmolive*, has held that "[d]eception itself is the evil the statute is designed to prevent." *Floersheim* v. *FTC*, 411 F.2d 874 (1969).[5] That holding is faithful to the Supreme Court decisions.

The promise of an unconditional "free trial" or "percent off," when both are conditional, is not in the public interest. A good society depends upon promises being kept. And individuals in society have a right to be told the truth, so that their choices among products, or, as in this case, among offers, can be understandingly made. If sellers in our society are free to compete for consumers' patronage with others by unfair advertising, not only is the consumers' right violated, but our commitment to fair competition becames a pretense. The courts "must set their faces" against those practices which are harmful to the public interest.

The record here contains ample proof of the need to protect the public interest. Spiegel's catalogues were distributed in interstate commerce and its advertisements inserted in numerous metropolitan newspapers. Between 1969 and July 1970, approximately three million circulars offering price discounts were distributed. Spiegel distributed two million "free trial" offers annually. Net sales by "hot merchandise" catalogues were estimated at $27,000,000 in 1969 and 1970, and $30,000,000 in 1971.

We hold that the complaint was justified and that the Commission did not waste its time with trivia in considering the alleged deceptive and unfair practices.

---

[5] See also *Exposition Press, Inc.* v. *FTC*, 295 F.2d 869, 873 (2nd Cir. 1961).

II.

Spiegel argues that the Commission's order is not supported by the evidence. We need not discuss the circular and catalogue statements at length in disposing of the argument. Suffice to say that the statements are clearly designed to attract credit customers to Spiegel's offers. For example, a multi-paged circular is sent with a typewritten invitation to the "Dear Customer" to try the nineteen "outstanding values . . . at our risk." "[Y]ou can order any or all of these values on 30-DAY FREE TRIAL. . . . All we require is that your order be for $10 or more. . . . We'll rush your merchandise to you." "[R]emember, you're not buying . . . merely trying." In the margin of the first page in large type is the following: "SEND NO MONEY. TRY ANY OF THESE VALUES 30 DAYS FREE." There is no statement in the circular itself of any condition or restriction, other than the $10 minimum. In another free trial offer there are small print statements of credit qualifications, such as "subject to [Spiegel's] acceptance."

The Commission did not find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the "free trial" and "percent off" offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.

We have examined the circulars and catalogues in the record containing similar statements, and we hold that the evidence gives substantial support to the Commission's

finding of a "capacity and tendency" to mislead the public. The testimony of Spiegel's vice-president that its advertisements lack "even the capacity to injure" does not compel a finding different from the Commission's.

III.

There is no merit in Spiegel's contention that there is a fatal variance between the complaint's allegation of failure to disclose conditions on the face of the advertisements and the Commission's finding that placement of the conditions was "far removed" from the allure of the advertisement. We find no variance. And this court's *Wrisley Co.* v. *FTC,* 113 F.2d 437, 442 (1940), does not support Spiegel.

IV.

Spiegel has not persuaded us that three of the four paragraphs in the order "violate the stipulation" entered into by the parties at the request of the hearing examiner, and consequently bear the "badge of unfairness."[6] Nor is the order, in our opinion, "vague and ambiguous."

The thrust of the four paragraphs in the Commission's order is a requirement that the credit conditions, relating to both prospective and established customers, be stated "clearly and conspicuously . . . in immediate conjunction with" the offer in order that the prospects not be misled by positioning conditions where the average person in Spiegel's market would be likely to overlook them. The order is reasonably related to the violations found.

---

[6] The parties at the hearing stipulated that the sole issue before the examiner was whether Spiegel's advertisements of "free trial" offers or "percent off" offers are unfair or deceptive because of the manner in which customers are notified of Spiegel's requirement of credit approval in order to obtain the benefit of such offers.

V.

We do not share Spiegel's concern that the Commission's order will effectively "ban" free trial offers. We refer to the apt statement of the Supreme Court in *Colgate-Palmolive, supra,* at 390: "We think it inconceivable that the ingenious, advertising world will be unable, if it so desires, to conform to the Commission's insistence that the public be not misinformed." In any event, unfair and deceptive advertisements cannot be justified on the basis that they are needed either as a service to the consumer or to meet competition in the market.

VI.

The original hearing examiner, at Spiegel's request, issued twelve subpoenas *duces tecum* against competitors of Spiegel. The succeeding examiner *sua sponte* quashed the subpoenas. Spiegel argues that the ruling deprived it of evidence bearing on the nature and extent of the order to be entered; and that the evidence sought would have shown Spiegel's conduct to have been exemplary vis-a-viz its competitors, since it alone of its competitors in the market stated credit conditions. It further claims the evidence was relevant to show it could believe its offers reasonable in light of its competitors' advertisements.

We hold that the ruling was not erroneous. The evidence sought was of no avail to Spiegel. Even if its competitors were more deceptive, the evidence was irrelevant. We note again the Cardozo statement, at p. 79 of *Algoma,* that "the Commission was not organized to drag the standards down." See also the Sixth Circuit's statement in *Collier & Son Corp.* v. *FTC,* 427 F.2d 261, 276 (1970): "The purpose of Commission orders is not

to put those employing deceptive acts or practices *in pari delicto* with each other." That Spiegel's competitors were worse does not require that Spiegel be permitted to continue the deception found by the Commission.

For the reasons given, the Commission's order is affirmed, and we direct its enforcement.

PELL, *Circuit Judge*, dissenting.

If for no other reason, the order of the FTC should be set aside by this court because of the utter triviality of the matter involved. I therefore respectfully dissent.

The FTC conceded the correctness of the general rule that detriment to the public interest must be shown. Here, by issuing its order, the FTC has in effect found there was detriment to the public interest in the situation of deadbeats being deceived into thinking that they are going to receive a free trial of, or a discount on, merchandise which they could not realistically purchase on either a cash or a deferred basis. It is difficult to imagine a less egregious affront to the public interest.

As early as 1924, only nine years after the FTC had begun to operate, it was stated that

> "[t]he Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern." G. Henderson, *The Federal Trade Commission* 337 (3d ed. 1927).

Similarly, the Hoover Commission noted in 1949 that

> "in the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance." Commission on the Organization of the Executive Branch of the Government, 81st Cong., 2d Sess., *Task Force Report on Regulatory Commissions,* app. N, 128 (Comm. Print 1949).

Most recently, the President's Advisory Council on Executive Organization, in its report entitled *A New Regulatory Framework* (January 1971), stated:

> "Much of the criticism of the FTC is aimed at its disproportionate attention to comparatively trivial matters—resulting largely from the breadth of its mandate and compounded by inherent deficiencies of the collegial form of organization. Preoccupation with minutiae over the years has created a 'jack of all trades—master of none' profile for the FTC." *Id.* at 87.

In *S. Buchsbaum & Co.* v. *Federal Trade Commission,* 160 F.2d 121 (7th Cir. 1947), this court, in holding that the findings and conclusion of the Commission that the petitioner had been guilty of deceptive acts was not supported by substantial evidence, made the following pertinent comment, at 123-24:

> "[E]ven though there be no proof of actual deception required, *there must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest.* 15 U.S.C.A. §45(b). Here the Commission made no finding that the deception, if any, had ever resulted in or had any tendency to result in detriment to the purchasing public. We find nothing in the

findings to support the conclusion that the acts and practices are 'all to the prejudice and injury of the public.'" (Emphasis added.)

Putting the most blatant possible interpretation on the advertising material of Spiegel, and assuming, *arguendo*, that the most astute and sophisticated reader would be unable to find any clue in the material that would impose any qualification or condition on the enjoyment of a free trial or a discount, whether that reader be an adult or a child, financially responsible or irresponsible, honest or dishonest, I cannot conceive that the public would be misled into thinking that these merchandising gimmicks were intended for any persons except a member of the prospective and potential purchasing public under circumstances in which Spiegel expected eventually either to receive the purchase price or the return of the merchandise. The inference that Spiegel intended to deal with financially irresponsible persons is scarcely supportable from the bare fact of a free trial offer or a discount possibility.

This is not a case where we are dealing with hidden charges which would vitiate the supposed discount, nor one where the applicant was supposedly getting a free trial but was actually required to keep the goods once they reached his possession. In fact, the parties stipulated that credit approval was the only restriction or condition qualifying these offers.

However, it is not necessary to decide the case on the above hypotheses. The basic evidence does not seem to be in dispute here, and that evidence in my opinion is totally lacking in substantiality to support a finding of deceptive advertising detrimental to the public. It is true that the statements that "All orders are subject to Spiegel Credit Approval" appeared on the catalogue rather than in equal

size type with the reference to discounts and free trials. However, I know of no prohibition of the use of an eye-catcher as long as the rest of the advertising material puts the eyecatcher in proper perspective.

Under any interpretation of the advertising material, it is clear that one cannot partake either of the free trial period or the discount without filling out and signing the order form. It is necessary for the prospective free trial user or discount applicant, if a new customer, to give detailed information about marital status, income, financial obligations, nature of employment, and similar factual data for credit evaluation. In varying language, the order form makes it clear that all orders are subject to acceptance by Spiegel. As to established credit customers, I cannot conceive that they were not already aware of the fact that a favorable credit rating is required and that if they are delinquent they will not be the beneficiary of further unpaid-for utilization of Spiegel merchandise.

In his conclusion, the trial examiner stated that the practices had the capacity to mislead members of the purchasing public into the purchase of substantial quantities of Spiegel products. I wholly fail to comprehend this, as the only ones who received the products were those who passed muster on credit. It is not an uncommon trait for people to overextend themselves in credit purchasing, but there is nothing about this advertising to cause this natural human tendency to exceed its present liberal boundaries. Protection against our human frailties may be arguably a worthwhile object of civilization, but in this country, absent deception or misleading representations, we are still free to determine such matters for ourselves.

The trial examiner emphasized that advertising must be truthful, but again I fail to find that, reasonably con-

strued, the advertising in question is otherwise. Also, the trial examiner specifically stated in reaching his conclusion that the advertising was deceptive and unfair that he did not do so on a basis of demonstrated injury to purchasers.

The Chairman of the Federal Trade Commission viewed this case and its inconsequentiality, as I do, and I adopt and agree with his statement in dissent as being the proper dispositive basis of the case:

> "I cannot agree that consumers would fail to appreciate that Spiegel's free-trial offers necessarily were subject to acceptance by Spiegel. The nature and amount of information obtained by Spiegel on its application forms, in my opinion, puts the consumer on notice that Spiegel has established criteria which prospective customers must meet prior to receiving the merchandise on a free-trial basis. It seems to me unlikely that a consumer would conclude that the information provided on the application form was irrelevant to Spiegel in deciding whether or not to provide the consumer with the offered merchandise.
>
> "Of course, it is arguable that some few prospective customers who sent in filled-in application forms may not have fully understood the conditional nature of the offer. Also, I appreciate that economic injury is not always a condition precedent to an order under Section 5. However, in the circumstances of this case where no economic loss of any consequence appears and where no testimony was received with respect to consumers' understanding of the import of the application forms or whether Spiegel's disclosures were in fact sufficient, the entry of an order is not warranted."

Finally, and in any event, the order entered by the Commission is far too broad and is unjustified by this particular velitation.[1]

For the reasons set out in this dissent, I would set aside the order of the Commission.

A true Copy:
Teste:

/s/ *Thomas F. Strubbe*
Clerk of the United States Court of Appeals for the Seventh Circuit.

by /s/ *Mary Ann Crotty,*
Deputy Clerk

---

[1] I do not dissent from that portion of the majority opinion dealing with Spiegel's inability to demonstrate that other mail order houses engage in the same type of inducement advertising but with less candor than Spiegel does. If a law violation exists, securing compliance with the law often follows selective prosecution of one among many violators. There is no indication here of other than a normal process of selectivity.

This phase of the case was again brought to my attention after the completion of the dissent by the receipt of my wife of a mailed offer from a nationally known merchandiser. On the envelope was the word in one inch letters, "FREE!" Inside, also in large letters, was reference to a free 14 day home trial of kitchen equipment. At the bottom of the backside of the "Free Trial Certificate," and nowhere else in the several sheets extolling the merchandise and referring to the privilege of free trial, small type stated, "All orders subject to credit acceptance or request for prepayment by our National Sales office."

I read the challenged order in this case as relating only to the consuming public and not as being based upon injury to competitors, although that was also charged in the complaint. If this latter aspect had been involved, it would appear that the Subpoenas Duces Tecum should not have been quashed.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
April 16, 1974.

Before

Hon. Roger J. Kiley, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

SPIEGEL, INC.,

Petitioner,

No. 73-1233 vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission

---

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and a majority of the members of the panel having voted to deny the petition for rehearing,*

It Is Ordered that the petition for rehearing in the above-entitled cause be, and the same is hereby, Denied.

---

* Judge Pell voted to grant the rehearing.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2003

SPIEGEL, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45-59) is reported at 494 F. 2d 59. The decision of the Federal Trade Commission (Pet. App. 1-23) is reported at 82 FTC 20.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1974, and a timely petition for rehear-

ing and suggestion for rehearing *en banc* was denied on April 16, 1974 (Pet. App. 60). The petition for a writ of certiorari was filed on July 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly concluded that the offer by a retailer of merchandise from a catalogue on a free-trial or other basis without clearly disclosing conditions or restrictions attached to the offer, had sufficient public impact to warrant a cease-and-direct order.
2. Whether the Commission's cease-and-desist order is reasonably related to the unlawful practices found and sufficiently specific.

STATUTE INVOLVED

Sections 5(a)(1) and 5(b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(1), (b), are set forth in the petition (p. 3).

STATEMENT

The facts found by the Commission are not in dispute. Through a catalogue, petitioner sells clothing, household appliances, kitchenware, and similar merchandise, most of its business being in interstate commerce (Pet. App. 10). For some years, its merchandising methods have included offers of goods, through direct mail and newspaper distribution, on a "free trial" basis or on a discount ("percent off")

basis.[1] Net sales generated by these offers were substantial—approximately $27 million both in 1969 and 1970, and $30 million in 1971 (Pet. App. 16). These offers were distributed both to those who were already credit customers of Spiegel and to prospective credit customers (Pet. App. 13-14).

Petitioner did not send merchandise to established credit customers who ordered it pursuant to these offers, however, unless four conditions were met: (1) the purchase price of the order, added to outstanding extensions of credit, was within the customer's credit limit; (2) payment on his account was current; (3) payments had been on time in the past; and (4) his account had been used within the past twelve months (Pet. App. 14-15, 17). Petitioner did not send ordered merchandise to those who had no previous credit account unless they completed a questionnaire included with the order form and petitioner approved extension of credit to them (Pet. App. 14).

Prior to the issuance of the Commission's complaint, petitioner did not disclose these conditions. Its catalogue and other advertising used only language such as "all orders are subject to acceptance by Spiegel." After the Commission issued its complaint, such language was changed to read "all orders subject to Spiegel's credit approval" (Pet. App. 13-16, 34-36, 42-44). These statements appeared in small

---

[1] Petitioner has stated that the discount offer has not been used since 1970, as it was unprofitable (Pet. App. 32-33).

type, although the catalogues included in boldface on their covers the statements "30 Day Free Trial" and "Send No Money" (Pet. App. 43).

The Commission concluded that the advertising challenged in the complaint had the capacity and tendency to mislead the consumer, that it was inherently unfair, even if those seeking to take advantage of the offers were not injured economically by the deception, and that this failure to make adequate disclosure was an unfair method of competition prohibited by Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (Pet. App. 18).

On petition for review, the court of appeals affirmed and enforced the order (Pet. App. 45-54). The court rejected petitioner's contention that the Commission's concern with truthful advertising was "too trivial for Commission attention" because the proof in this case did not show injury to the public or to competition (Pet. App. 48-50). It held that the Commission's order was supported by substantial evidence (Pet. App. 51-52), was neither vague nor overly broad (Pet. App. 52), and would not injure the public by ending free-trial offers (Pet. App. 53).[2]

---

[2] The court also rejected petitioner's contentions that there was a prejudicial variance between the complaint's allegations that the conditions to the offer were unstated, and the ultimate finding that they were insufficiently disclosed (Pet. App. 52), and that petitioner should have been allowed, by third-party subpoenas, to show that its competitors were engaged in similar or worse violations (Pet. App. 53-54).

ARGUMENT

Petitioner principally contends (1) that any deception was so "trivial" that the issuance of an order was not in the public interest and (2) that the Commission's order is vague and excessively broad. The court of appeals correctly rejected both contentions and no further review by this Court is warranted.

1. The Commission exercises a broad discretion in determining whether a proposed proceeding will be in the public interest (15 U.S.C. 45(b)), and this Court has long recognized the Commission's responsibility to assure truthfulness in advertising. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 387-390. *See also Floersheim* v. *Federal Trade Commission*, 411 F. 2d 874, 878 (C.A. 9); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869, 873 (C.A. 2), certiorari denied, 370 U.S. 917; *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (C.A. 5), certiorari denied, 393 U.S. 980. In view of the public interest in truthful advertising practices and the substantial volume of business involved in petitioner's free trial orders (see p. 3, *supra*), the court of appeals correctly concluded that in this case the Commission "did not waste its time with trivia * * *" (Pet. App. 50).

Petitioner contends that the Commission's order will curtail sharply, if not eliminate, the use of free trial offers. The assessment of the effects of deceptive advertising required by Section 5 "rests * * * heavily

on inference and pragmatic judgment" based on "enlightment gained from administrative experience." *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 385. Deception for the sake of attracting customers is still deception, even if the customer is not demonstrably injured. *Id.* at 388-389; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78.

The court of appeals in the present case properly concluded (Pet. App. 50):

> [T]he promise of an unconditional "free trial" or "percent off," when both are conditional, is not in the public interest. A good society depends upon promises being kept. And individuals in society have a right to be told the truth, so that their choices among products, or, as in this case, among offers, can be understandingly made.

Spiegel urges that the offers were not in fact advertised as unconditional. But, as the court of appeals noted, the violation found by the Commission was not that conditions were completely unstated but that they "were not stated or located in such a way that customers, without undue difficulty, would understand" them (Pet. App. 51). "The important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Distribs. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679-680 (C.A. 2); see *Ward Labs., Inc.* v. *Federal Trade Commission*, 276 F. 2d 952, 954 (C.A. 2), certiorari denied, 364 U.S. 827. The court below, after reviewing the advertise-

ments in question, held that the Commission's finding of a capacity and tendency to deceive was supported by substantial evidence (Pet. App. 51-52).

With respect to the wording of the conditions that the advertised offers did contain, petitioner blurs the distinction between the practices before and after issuance of the Commission's complaint. Prior to the issuance of the complaint, the language simply indicated that all orders were subject to petitioner's approval or acceptance, without express mention of credit. Whether the references to "credit approval" added after the issuance of the complaint, if properly and prominently displayed, will partially comply with the Commission's order is a matter for determination under Commission compliance procedures; but it is well-established that even complete discontinuance or abandonment of an unfair trade practice after issuance of a complaint does not make issuance of a cease-and-desist order improper. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 322 (C.A. 8), certiorari denied, 384 U.S. 939.

2. The court of appeals properly found that the order is reasonably related to the unlawful practices found to exist and is not too vague or ambiguous.

The order (Pet. App. 20-21) contains four paragraphs. Paragraph 1 requires that offers to *prospective* credit customers of a "free trial" or "percentage off" the price of merchandise "clearly and conspicuously disclose * * * in immediate conjunction with such offer that it is subject to * * * [petitioner's] credit approval." Paragraph 2 provides that

"free trial" offers to *established* credit customers must similarly disclose "any credit restriction or condition which would make a customer ineligible" for the offer, "or any other restriction or condition applicable to such offer." Paragraph 3 requires, as to *prospective* credit customers, that the order blank questionnaire for a "free trial offer or other offer" disclose "at the top" that it is "an application for credit" and that the order will be filled only if the customer is approved for credit. Paragraph 4 prohibits petitioner from representing that an offer is available without conditions when such offer is in fact conditional. All of these paragraphs are directly responsive to deficiencies found by the Commission (Pet. App. 16-18) in the disclosure of credit-approval conditions on petitioner's offers.

Paragraph 4, which petitioner especially attacks, is designed "to close all roads to the prohibited goal * * *." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. Petitioner's reliance on *Federal Trade Commission* v. *Colgate-Palmolive Co., supra,* in claiming that paragraph 4 is over-broad, is misplaced, in view of the similarity between the order approved there (see 380 U.S. at 382, 394-395) and paragraph 4. Neither order limits its prohibition to repetition of the specific violation found; rather the scope is broad enough to bar the general type of practice for which the violators have shown a predilection. In *Colgate-Palmolive* it was not just simulation of sandpaper that had to be stopped but misrepresentations that viewers were seeing a test of a

product. Here, it is not just a credit approval condition that must be stated, but any condition that limits the availability of an offer.

The strictures petitioner must observe are clear enough. But, as this Court said in *Colgate-Palmolive*, if petitioner should genuinely doubt whether a proposed course of action will violate the order, it may "oblige the Commission to give * * * definitive advice as to whether * * * [a] proposed action, if pursued, would constitute compliance * * *" (380 U.S. at 394), by invoking the Commission's rule providing for such advice. 16 C.F.R. 3.61(d).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CALVIN J. COLLIER,
General Counsel,

GERALD HARWOOD,
Assistant General Counsel,

WILLIAM A. E. DOYING,
Attorney,
Federal Trade Commission.

SEPTEMBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 538920 42